STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	)	
On Its Own Motion	)	
	)	**Docket No. 01-0539**
Implementation of Section 712(g) of the	)	
Public Utilities Act	)	

INITIAL BRIEF OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

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The Staff of the Illinois Commerce Commission ("Staff"), by and through its counsel, and pursuant to Section 200.800 of the Commission's Rules of Practice (83 Ill. Adm. Code 200.800), respectfully submits its Initial Brief in the above-captioned matter.

I. INTRODUCTION

This rulemaking was commenced by the Commission on August 8, 2001, to implement the directive in Section 13-712(g) of the Public Utilities Act that "[t]he Commission shall establish and implement carrier to carrier wholesale service quality rules and establish remedies to ensure enforcement of the rules." 220 ILCS 5/13-712(g). Ensuring that wholesale services are provided at a level that provides a meaningful opportunity to compete is critical to the development of competition in the State of Illinois. The legislatures enactment of Section 13-712(g) recognizes not only the importance of wholesale service quality, but also the necessity to have "remedies" to ensure compliance with applicable standards. As will be described in more detail below, Staff had developed a proposed rule that is designed to meet this critical need as per the legislatures direction, and which is reasonable and fair to all parties. Staff recommends adoption of its proposed rule as set forth herein.

II. PROCEDURAL HISTORY

This proceeding originated as a result of Section 13-712(g) of the Public Utilities Act ("PUA"), enacted as part of P.A. 92-0022 (sometimes referred to as HB 2900), effective June 30, 2001, which provides as follows:

> (g) The Commission shall establish and implement carrier to carrier wholesale service quality rules and establish remedies to ensure enforcement of the rules.

220 ILCS 5/13-712(g); *see also* ICC Staff Ex. 1.0 at 3. As a result of this enactment, the Commission initiated Docket 01-0539 on August 8, 2001, to establish and implement carrier to carrier wholesale service quality rules and to establish remedies to ensure enforcement of the rules as mandated by Section 13-712(g) of the PUA. ICC Docket No. 01-0539, Order at 1-2 (August 8, 2001).

Immediately after the Commission's order initiating this proceeding, Staff contacted all Illinois local exchange carriers and organized an initial workshop on August 30, 2001. Subsequent workshops were held on September 26, 2001; October 16, 2001; November 7, 2001; January 23, 2002; March 7, 2002; and April 11, 2002. Several carriers and industry groups attended Staff's workshops, including representatives from AT&T, Focal, Verizon, WorldCom, Citizens, SBC/Ameritech, SNG Communications, ITA, IITA, PrimeCo, McLeodUSA, TDS Metrocom, RCN, Novocom, Allegiance, Ushman Communications, GVNW Consulting, Gallatin River, Madison River Communications, Choice One, Sprint, Voicestream, Shawnee Telephone, and XO Communications. During the workshops, Staff solicited comments from the participants. Many of these comments were incorporated into Staff's Proposed Rule for Part 731. ICC Staff Ex. 1.0 at 4.

Petitions to Intervene were filed by various interested parties, including Ameritech Illinois ("AI" or "Ameritech"), Allegiance, AT&T Communications of Illinois, Inc. ("AT&T"), Citizens Telecommunications Company of Illinois ("Citizens"), Illinois Telecommunications Association ("ITA"), Verizon North Inc. and Verizon South Inc. (jointly, "Verizon"), Illinois Consolidated, 21st Century, Illinois Independent Telephone Association ("IITA"), MCI World Com ("MCI"), McLeodUSA Telecommunications Services, Inc. ("McLeod"), Gallatin River, Illinois Independent Telephone Association ("IITA"), Mpower Communications Corp., Globalcom, Inc., XO Illinois, Inc., Focal Communications Corp., Illinois Rural Competitive Alliance ("IRCA"), Sprint Communications L.P., and PrimeCo Personal Communications and U.S. Cellular, Inc. and VoiceStream Wireless Corp., (jointly, "Wireless Coalition") and Staff.

On May 8, 2002, Staff filed its direct testimony, and attached a proposed Part 731. On June 11, 2002, the parties who intervened in the proceeding filed direct testimony. Per the ruling of the Administrative Law Judge on June 14, 2002, all parties filed supplemental direct testimony on July 5, 2002. On July 16, 2002, all parties filed rebuttal testimony. Evidentiary hearings were held on July 23 and 24, 2002, and August 13, 2002.

III. OVERVIEW OF STAFF'S PROPOSED RULE

Staff's proposal in this docket has evolved through both the workshops and testimony. The text of Staff's proposed rule was initially presented at Attachment 1.1 to the direct testimony of Staff witness Samuel S. McClerren, Engineering Analyst in the Engineering Department of the Telecommunications Division of the Illinois Commerce Commission ("Commission"). ICC Staff Ex. 1.0 at 1. Modifications to Staff's proposed rule were subsequently introduced in Mr. McClerren's supplemental direct and rebuttal

testimony. ICC Staff Ex. 6.0, Attachment 6.1; ICC Staff Ex. 7.0, Attachment 7.1. Ultimately, several minor modifications to Staff's proposed rule were made at the hearings in this matter. Thus, for the convenience of the Commission, the Administrative Law Judges and the Parties, Staff has attached a current version of Staff's proposed rule (hereafter referred to as "Staff's Proposed Rule") as Attachment 1 to this initial brief. Staff's Proposed Rule is presented in legislative style to show changes from Staff's proposed rule as reflected in Attachment 7.1 to ICC Staff Ex. 7.0.[1]

Mr. McClerren's direct testimony (ICC Staff Ex. 1.0) discussed the overall framework and structure of Staff's Proposed Rule and explained the meaning and intent of various sections. Staff witnesses Russell Murray, Kathy Stewart, Melanie Patrick, and Alcinda Jackson also discussed in their testimony (ICC Staff Exhibits 2.0, 3.0, 4.0 and 5.0, respectively) many of the specific sections and details of Staff's Proposed Rule. ICC Staff Ex. 1.0 at 2. Staff witness Samuel S. McClerren also presented revisions to Staff's proposed rule in his rebuttal testimony. ICC Staff Ex. 7.0 at 1. Staff witnesses Russell Murray, Kathy Stewart, Melanie Patrick, and Alcinda Jackson also respond to several witnesses in their rebuttal testimony (ICC Staff Exhibits 8.0, 9.0, 10.0 and 11.0, respectively), and also provide support for changes incorporated into Staff's Proposed Rule.

Mr. McClerren's testimony addressed how Staff established the language for the final draft rule of Part 731. Mr. McClerren explained why Staff's Proposed Rule is in the public interest and responsive to the legislature's direction for the Commission to

[1] Unless otherwise indicated, all references in this initial brief to a Section, Paragraph or Part of Staff's proposed rule are to Staff's Proposed Rule attached hereto as Attachment 1.

promulgate service quality rules for carriers providing wholesale telecommunications service in the state of Illinois. Furthermore, Mr. McClerren's testimony explains how Staff's Proposed Rule provides assurances to carriers purchasing wholesale services that the services will be provided in a quality manner, and that remedies will be imposed in the event of inadequate performance by the wholesale service provider. Staff's Proposed Rule also minimizes regulatory burden on carriers, classifies different sizes of firms through levels, provides for both the approval and ongoing review of plans, considers reporting requirements, directs auditing requirements, and contemplates a process for carriers converting from one level to another. ICC Staff Ex. 1.0 at 3.

A. General Framework of Staff's Proposed Rule

All of the parties that attended the workshops did not agree with Staff's Proposed Rule. It became apparent during the workshops that complete agreement among all the parties would be difficult or impossible to achieve because the interests of the parties were rather diverse. Staff's Proposed Rule represents Staff's best effort to develop a rule that balances the interests of all parties consistent with the language and legislative intent of Section 13-712(g). ICC Staff Ex. 1.0 at 4-5.

The language of Section 13-712(g) as well as relevant legislative history clearly establish that the legislature created Section 13-712(g) because it was very concerned about service quality and wanted to develop and protect the evolving competitive telecommunications markets in Illinois. Section 13-712(g) requires the Commission to implement a rule setting forth wholesale service quality standards and providing remedies. This language clearly indicates that Section 13-712(g) was intended to benefit the carrier purchasing services from a wholesale provider. During the course of the workshops, Staff listened closely to the needs of carriers purchasing services from

other carriers and developed a rule that balanced those needs against the administrative burdens imposed on carriers providing wholesale services. ICC Staff Ex. 1.0 at 5. Although it was impossible for Staff to balance all the competing interests of the various parties in a manner that satisfied everyone, it is Staff's belief that its Proposed Rule is a rule that is fair to all parties and meets the requirements of Section 13-712(g). ICC Staff Ex. 1.0 at 5.

One aspect of the current competitive telecommunications market in Illinois that was conveyed to Staff as pertinent to this rulemaking is the fact that the carriers purchasing service from the other carriers purchase a great majority of their wholesale services and products from the larger incumbent local exchange carriers ("ILECs"). ICC Staff Ex. 1.0 at 6. Accordingly, there was a reasonable factual basis and need to vary the appropriate performance standards, reporting requirements, and remedies between large ILECs on the one hand and smaller ILECs and competitive local exchange carriers ("CLECs") on the other. *Id*. Staff adopted a multi level classification of carriers with specific requirements unique to each level to address this need. In general, large ILECs are classified as Level 1 carriers, other ILECs are classified as Level 2 carriers, rural ILECs are classified as Level 3 carriers, and all other LECs are classified as Level 4 carriers. *Id*.

There are a number of ways in which Staff's Proposed Rule balances the needs of purchasing carriers against the administrative burdens imposed on the carriers providing wholesale services. For example, Level 1 carriers with preexisting plans (e.g., Ameritech Illinois and Verizon) will use their preexisting wholesale service quality plans that were developed as a result of merger commitments as the starting point for

Commission approval of the wholesale service quality plans to be filed by Level 1 carriers under Staff's Proposed Rule. It is not Staff's intent that the considerable effort to develop those preexisting plans would be disregarded or minimized in response to this rulemaking. ICC Staff Ex. 1.0 at 7. With respect to Level 2 carriers, Staff proposed a limited set of performance measures to eliminate the administrative burdens of developing and maintaining a wholesale service quality plan similar to the plans of the Level 1 carriers. With respect to Level 3 carriers, Staff acknowledged the rural exemption under the 1996 Act and market realities, and did not ascribe specific responsibilities for these carriers under this rule unless they lose their rural exemption. With respect to Level 4 carriers, Staff's Proposed Rule allows those carriers that do not have Section 251(c) obligations and are not Level 3 carriers to be exempted until the carrier receives a bona fide request for wholesale service and agrees to provide such services or is obligated to provide such services. ICC Staff Ex. 1.0 at 7.

B. Basis For Multi-Level Approach

Staff adopted the multi-level approach for several reasons, including but not limited to reasonableness, administrative ease, logical designation, and purchasing carrier requests. ICC Staff Ex. 1.0 at 15-16. Regarding reasonableness, it would have been illogical and unreasonable to develop a rule that treated all carriers the same. First, the level of competitive entry and provision of wholesale services varies significantly among ILECs and even more so between ILECs and CLECs. Id. For those carriers with very limited provisioning of wholesale services, the benefit of maintaining and reporting detailed and sophisticated performance measures and disaggregations is likely to be outweighed by the cost of maintaining and reporting such data. *Id*. On the other hand, for carriers with significant wholesale activity the benefit of maintaining and

reporting detailed and sophisticated performance measures and disaggregations is likely to outweigh the related costs. *Id*. Second, the level of automated versus manual OSS systems, as well as the procedures and methods for provisioning wholesale services, varies significantly among carriers. Thus, even if all other factors were equal, it would be virtually impossible to incorporate in a rule a single set of wholesale service quality standards to apply to all carriers. *Id*. Staff's multi-level approach addressed these issues by requiring Level 1 carriers to file a company specific Wholesale Service Quality Plan and setting forth the parameters and requirements for such a plan in Subparts B, C, D, and E. *Id*.

Regarding administrative ease, two Illinois carriers have already been required through other proceedings to develop wholesale service quality plans, and under Staff's Proposed Rule those plans will serve as the starting point for the Wholesale Service Quality Plans to be filed under this rule. ICC Staff Ex. 1.0 at 16. With the exception of wholesale special access services, to the extent the Commission believes that the preexisting wholesale service quality plans and associated remedy provisions were and remain adequate, the Commission may simply accept the preexisting wholesale service quality plans and associated remedy provisions and order that those plans remain in effect. *Id*. To the extent the Commission agrees that certain modifications need to be made, the Commission may simply order the modifications be added. The point is that the original plans for both Illinois Level 1 carriers will largely remain intact, and the significant effort to develop those plans will not be wasted. *Id*.

Regarding logical designation, it is appropriate that a larger carrier (i.e., more access lines) should provide more detail regarding wholesale performance than a

carrier with relatively few access lines. ICC Staff Ex. 1.0 at 17. Larger carriers typically operate in markets that provide more competitive opportunities, which means they have more competitors seeking access to their facilities. *Id*. It also means that a larger carrier has more resources available to both develop and maintain a wholesale service quality plan and associated remedy plan relative to a smaller carrier which might not have the personnel or demand to support a statistically valid plan. *Id*.

Regarding purchasing carrier requests, it is Staff's understanding from the workshops that carriers purchasing wholesale services were more interested in markets represented by Level 1 carriers. ICC Staff Ex. 1.0 at 17. The carriers purchasing wholesale services also appeared to understand the impracticality of imposing hundreds of measures and thousands of disaggregations on carriers with little or no current wholesale activity. *Id*. It is also expensive for both the carrier purchasing wholesale services and a Level 2 carrier provisioning wholesale services to agree and build an automated operations support system. *Id*. While this situation may change in the future, the current reality appears to be that there is limited interest in the markets represented by Level 2 carriers. *Id*. To the extent that the current situation changes, this rule can be revisited in 2 years as part of the Commission's biennial review of existing rules under Section 13-512. Id.

C. Organization and Description of Staff's Proposed Rule

1. Subpart A - General

Subpart A of Staff's Proposed Rule is a general section with purpose, definitions, policies, classifications, and applicability subsections. Subparts B, C, D, and E deal with Level 1 carriers, including filing procedures, plan requirements, applicable provisions, and Commission review. Subpart F addresses the requirements applicable to Level 2

Carriers. Finally, Subparts G and H address the provisions applicable to Level 3 and Level 4 carriers, respectively. ICC Staff Ex. 1.0 at 8.

Section 731.100 sets forth the purpose of Part 731 and the general scope of its application. Section 731.100 also summarizes the subject matter of Subparts B, C, D, and E (guidelines for development and submittal of wholesale service quality plans for Level 1 carriers), Subpart F (wholesale service obligations of Level 2 carriers), and Subparts G and H (application and scope of exemption of certain carriers from the provision of Subparts B, C, D, E, and F. ICC Staff Ex. 1.0 at 9.

Section 731.110 sets forth the policies, goals and objectives of Part 731 and provides that this rule should be interpreted in a manner consistent with those policies, goals and objectives. Some of the key policies, goals and objectives include seeking to foster a competitive telecommunications marketplace, maintaining public safety, protecting end users, satisfying the public interest, seeking reduced prices to consumers, and maintaining levels of service quality. The detailed list of policies, goals and objectives will assist the Commission and all parties in applying the specific criteria contained in other sections of the rule. ICC Staff Ex. 1.0 at 14.

Section 731.115 is entitled “Classifications of Carriers” and sets forth detailed descriptions of the four levels of carriers under the rule. Subparagraph (a) of Section 731.115 defines Level 1 Carriers as those carriers that (1) provide wholesale service and already have a Preexisting Plan, (2) have obligations pursuant to Section 251(c) of the Telecommunications Act and have at least 400,000 access lines, or (3) have been directed by the Commission to comply with Level 1 requirements pursuant to Section 731.635. The two largest ILECs in the state of Illinois (Ameritech and Verizon) already

have preexisting wholesale service quality plans as a result of merger related requirements. ICC Staff Ex. 1.0 at 14-15. Item (1) simply recognizes that those carriers with such preexisting plans will be classified as Level 1 carriers. *Id*. Although the carriers that currently fall under item 2 also fall under item 1, item 2 makes clear that large ILECs will be classified as Level 1 carriers. Section 731.635 of Subpart F provides that a Level 2 carrier may be required to comply with some or all of the Level 1 requirements if ordered by the Commission after considering the technical and economic feasibility of compliance with such requirements, the expected volume of wholesale service by the carrier, and whether the expected benefits justify the cost of compliance with the Level 1 requirements. Item 3 makes clear that any Level 2 carrier so ordered to comply with all of the requirements of Subparts B, C, D, and E will be classified as a Level 1 carrier. *Id*.

Level 2 carriers are measured relative to unbundled local loops, interconnection trunks, resold local services, collocation, loss notification, and customer service record. Standards for these measures were developed, as well as specific remedy amounts for non-performance. ICC Staff Ex. 1.0 at 18.

Level 3 carriers are defined under Subparagraph (c) of Section 731.115 as LECs with a rural exemption from the obligations of Section 251(c) of the Telecommunications Act. Subparagraph (d) of Section 731.115 defines Level 4 carriers as LECs that do not have Section 251(c) obligations under the Telecommunications Act and are also not Level 3 carriers. ICC Staff Ex. 1.0 at 18.

2. Subpart B – Procedure for Level 1 Carriers

Subpart B sets forth the procedures applicable to Level 1 carriers. In general, these procedures govern the filing of Wholesale Service Quality Plans pursuant to the

rule. Subparagraph (a) of Section 731.200 establishes that Level 1 carriers must file tariffs containing their Wholesale Service Quality Plans on April 1, 2003, and every 2 years thereafter, in accordance with the requirements of Subparts B, C, D, and E. If a carrier proposes to maintain its existing tariffed plan, it may file a verified statement to that effect in lieu of a new tariff. ICC Staff Ex. 1.0 at 19.

Section 731.220 sets forth the pre-filing requirements for tariffs containing Wholesale Service Quality Plans. This section is addressed in the testimony of Staff witness Kathy Stewart. ICC Staff Ex. 1.0 at 20.

Section 731.230 describes the special and general rules for determining the effective Wholesale Service Quality Plan pending review by the Commission of the carrier's tariffed plans under the rule. This section makes clear that the rules generally applicable to tariffs control the effective date of a tariff containing a Level 1 carrier's Wholesale Service Quality Plan. This section also makes clear that carriers with a preexisting plan, which effectively means SBC/Ameritech Illinois and Verizon due to the merger orders in Dockets 98-0555 and 98-0866, respectively, those carriers operate under their preexisting plans, as defined in this rule, until the effective date of its tariff due to be filed April 1, 2003, under Section 731.200. ICC Staff Ex. 1.0 at 20-21.

3. Subpart C – Plan Requirement for Level 1 Carriers

Sections 731.300, 731.305, 731.310, 731.315, 731.320 and 731.325 set forth the requirements for a Level 1 carrier's Wholesale Service Quality Plan and addresses requirements for services covered, measures and standards, remedies, reporting, and auditing. ICC Staff Ex. 1.0 at 21-22. Section 731.305 describes the services to be covered in a Level 1 carrier's Wholesale Service Quality Plan, and specifically includes wholesale special access services. Section 731.315 provides that consistent with the

requirements of Section 13-712(g), Level 1 carriers must have self executing remedy provisions in their Wholesale Service Quality Plan. ICC Staff Ex. 1.0 at 22.

4. Subpart D – Provisions Applicable to All Level 1 Carriers

Subpart D sets forth provisions applicable to all Level 1 carriers. Section 731.400 sets forth the effect of Wholesale Service Emergency Situations. Performance relative to the standards will not be considered to be in violation if problems are due to Wholesale Service Emergency Situations. The definition of Wholesale Service Emergency Situations contained in Section 731.105 is very close to the definition of emergency situations accepted by the Commission in Docket 01-0485, Customer Credits Rulemaking. The only variances are in the identification of the applicable parties. Instead of a retail carrier and an end user, this definition contemplates the relationship between a carrier providing wholesale service and a carrier purchasing wholesale service. Both definitions agree that natural disasters, acts of third parties, tornado, or sever storm should be considered in the provision of service to either end users or a carrier purchasing wholesale service. ICC Staff Ex. 1.0 at 23. Section 731.420 sets forth the effect of interconnection agreements and describes the interaction of this rule and interconnection agreements for Level 1 carriers. ICC Staff Ex. 1.0 at 24.

5. Subpart E – Commission Review and Adoption of Plans for Level 1 Carriers.

Subparagraph (b) of Section 731.500 describes the basis for adoption of, and indicates the criteria that the Commission shall consider and address in adopting, a Wholesale Service Quality Plan. ICC Staff Ex. 1.0 at 24. These criteria include the

comprehensiveness, clarity, meaningfulness, and accuracy of the proposed Wholesale Service Quality Plan. ICC Staff Ex. 1.0 at 24-25.

6. Subpart F – Level 2 Carriers

Subpart F sets forth the obligations of Level 2 carriers. Section 731.600 specifies the wholesale services that are covered for a Level 2 carrier, to the extent that a Level 2 carrier provides the listed wholesale service. Services covered for Level 2 carrier's in this rule are unbundled local loops, interconnection trunks, resold local services, collocation, loop notification, and customer service record. ICC Staff Ex. 1.0 at 25. Subparagraph (a) of Section 731.605 sets forth the measures and standards for firm order confirmations ("FOCs") and specifies that a Level 2 carrier will provide either FOCs or reject notices to a requesting carrier within 24 hours for unbundled local loops and resold local services, and within 10 business days for interconnection trunks and collocation arrangements. There are three bullet points at the end of the section that provide further definitions regarding FOCs. ICC Staff Ex. 1.0 at 25. Subparagraph (b) of Section 731.605 sets forth the measures and standards for provisioning and establishes that unbundled local loops and resold local services will be provisioned within 5 business days, interconnection trunks will be provisioned within 30 business days, and collocation arrangements will be provisioned within 90 business days. ICC Staff Ex. 1.0 at 25. There are three bullets further explaining provisioning intervals, including the provisioning interval for the high frequency portion of the loop ("HFPL"). ICC Staff Ex. 1.0 at 25-26.

Subparagraph (c) of Section 731.605 sets forth the measures and standards for maintenance and repair and provides that trouble reports for unbundled local loops and resold local services will be cleared in 24 hours, while trouble reports for interconnection

trunks and collocation arrangements will be cleared in 8 hours. ICC Staff Ex. 1.0 at 26. There are two bullet points under maintenance and repair clarifying the measures, including a clarification that "non-out of service" troubles, or service affecting troubles, will be cleared by the end of the next business day. ICC Staff Ex. 1.0 at 26. Subparagraph (d) of Section 731.605 provides that the standard for loss notifications for both UNE-platform and resale is within 24 hours. ICC Staff Ex. 1.0 at 26.

Subparagraph (e) of Section 731.605 provides that Level 2 carriers shall provide customer service records to requesting carriers within 24 hours. ICC Staff Ex. 1.0 at 26. This issue is discussed in the testimony of Staff witness Alcinda Jackson.

Subparagraph (f) of Section 731.605 provides instances in which a Level 2 carrier will not be considered to be in violation, even though its performance is not up to minimum standard requirements. This list of exceptions is consistent with the list of exceptions contained in 13-712(e)(6), in which the legislature indicated that credits for retail service are not required under these circumstances, such as a negligent or willful act of the customer, customer premises equipment, or an emergency situation. ICC Staff Ex. 1.0 at 26-27. The same mitigating factors also logically applied to the wholesale relationship. Similar to the rewording Staff had to perform on Part 732's definition of emergency situation, Staff also reworded this list of exceptions to reflect the change in relationship from between a retail carrier and its end user to the relationship between a carrier selling wholesale services and a carrier purchasing wholesale services. ICC Staff Ex. 1.0 at 27.

Section 731.610 describes the remedies to be applied for a Level 2 carrier's failure to comply with Section 731.605. The testimony of Staff witness Dr. Melanie Patrick contains a detailed description of the remedy provisions.

Section 731.620 sets forth reporting requirements for Level 2 carriers. Please refer to the testimony of Staff witness Dr. Melanie Patrick for a further description of the reporting section. ICC Staff Ex. 1.0 at 27. Section 731.625 sets forth auditing requirements for Level 2 carriers. Staff is not recommending an automatic annual audit for Level 2 carriers. ICC Staff Ex. 1.0 at 27. Carriers purchasing wholesale services from a Level 2 carrier may request an independent audit, and if the independent audit confirms the concerns of the purchaser, the Level 2 carrier is responsible for the cost of the independent audit. If the independent audit does not confirm the concerns of the purchaser, the purchaser will be responsible for the cost of the independent audit. Any disputes over payment amounts will be resolved by the Commission. This section also requires a Level 2 carrier to make records available for audit, and to retain those records for at least 3 years. ICC Staff Ex. 1.0 at 28.

Section 731.630 establishes the effect of interconnection agreements for Level 2 carriers. This section indicates that an interconnection agreement may take precedence over this rule if both parties agree, if the interconnection agreement or an amendment to the agreement specifically reference this section, and if the changes to the standards and requirements set forth in the rule are not contrary to the public interest. If there is no interconnection agreement, then the standards and measures in this section apply. ICC Staff Ex. 1.0 at 28.

Subparagraph (a) of Section 731.635 prescribes instances in which a Level 2 carrier may be required to comply with all or some of the Level 2 requirements. ICC Staff Ex. 1.0 at 28.

7. Subpart G – Level 3 Carriers

Subpart G sets forth provisions applicable to Level 3 carriers. Section 731.700 establishes that LECs with a rural exemption under Section 251(f) of the Telecommunications Act are excluded from Level 1 or Level 2 requirements. Subparagraph (a) of Section 731.705 states that a Level 3 carrier that loses its rural exemption will become a Level 2 carrier and comply with the requirements of a Level 2 carrier within 90 days of the Commission order. Subparagraph (b) of Section 731.705 provides that a Level 3 carrier whose rural exemption is terminated by this Commission may petition the Commission for an exemption from some or all of the Level 2 requirements. The petitioner has the burden of proving that the Level 2 requirements should be modified due to factors such as technical or economic feasibility, expected demand, or costs. ICC Staff Ex. 1.0 at 29.

8. Subpart H – Level 4 Carriers

Subpart H sets forth provisions applicable to Level 4 carriers. ICC Staff Ex. 1.0 at 29. Section 731.800 indicates that Level 4 carriers are exempt from many of the requirements applicable to Level 1, Level 2, and Level 3 carriers. ICC Staff Ex. 1.0 at 29. Section 731.800, however, provides that Level 4 carriers are subject to service quality standards for CSRs, Unbundled Loop Returns, and Loss Notifications Section 731.805 provides that Level 4 carriers shall provide CSRs, Unbundled Loop Returns, and Loss Notifications within 24 hours. Section 731.810 describes the remedies to be

applied for a Level 4 carrier that fails to comply with Section 731.805. These standards and issues are addressed in the testimony of Alcinda Jackson.

Section 731.815 sets forth the procedures and rules for application of Level 2 requirements to Level 4 carriers and conversion of Level 4 carriers to Level 2 carriers. Subparagraph (a) of this section indicates that if a Level 4 carrier receives a bona fide request ("BFR") for wholesale service and agrees to provide such service or is required to provide such service, that carrier may be required to comply with Level 2 requirements. The Commission may consider factors such as technical or economic feasibility, expected demand, or costs on the carrier prior to ordering that the Level 4 carrier is subject to Level 2 obligations. ICC Staff Ex. 1.0 at 29.

9. Subpart I – Notice of Termination Provisions for All Carriers

Section 731.900 is an additional provision of Staff's proposed final draft rule for 83 Illinois Administrative Code Part 731 ("Proposed Part 731") setting forth certain notice requirements for termination of wholesale service. ICC Staff Ex. 6.0 at 1. Staff conducted a workshop with the parties to discuss Section 731.900 on June 19, 2002. ICC Staff Ex. 6.0 at 2.

One component of carrier to carrier wholesale service quality is the termination of service by the provisioning carrier. ICC Staff Ex. 6.0 at 2. Although wholesale service quality is often thought of in terms of the relative level of service provided (such as the relative time in which a service is provisioned), service quality also includes those situations in which service does not exist for whatever reason. ICC Staff Ex. 6.0 at 2. For instance, the manner and procedure by which a service is terminated is also subject to service quality standards. When a wholesale service is terminated or discontinued, there is a high probability that the requesting carrier will be unable to provision retail

service to one or more of its end users. ICC Staff Ex. 6.0 at 2-3. The purpose of Staff's proposed Section 731.900 is to provide a clear minimum notice requirement before wholesale service is terminated so that (i) the requesting carrier and the provisioning carrier will have a prescribed amount of time to resolve the issue(s) causing the provisioning carrier to terminate the wholesale service or (ii) if such issue(s) cannot be resolved, to allow sufficient time for the requesting carrier to notify its end user customers who will lose service as a result of the termination of the wholesale service. ICC Staff Ex. 6.0 at 3.

Staff's proposed Section 731.900 requires written notice to be given by the provisioning carrier to the requesting carrier and the Illinois Commerce Commission ("Commission") no less than 35 days prior to termination, discontinuance or abandonment of a wholesale service. Staff witness McClerren testified that 35 days is a reasonable minimum notice requirement. ICC Staff Ex. 6.0 at 3. First, in a scenario where the requesting carrier has no other means to provision a retail service to one or more of its end users, 35 days notice will allow at least five days for the requesting carrier to provide 30 days notice to its affected customers where required pursuant to Section 13-406 of the Illinois Public Utilities Act. ICC Staff Ex. 6.0 at 3. Second, if there is any basis to stay or suspend the proposed termination or seek other relief, the 35 days notice will provide adequate time for the requesting carrier to seek any relief to which it may be entitled before a court or the Commission. ICC Staff Ex. 6.0 at 3. Finally, to the extent that the Commission has authority to take some independent action with respect to a proposed termination, discontinuance or abandonment, 35 days

notice will provide a reasonable amount of time for the Commission to take such action. ICC Staff Ex. 6.0 at 3-4.

Section 731.900 does not prescribe the form of notice to be given. It is Staff's intent that any form of written notice to the Commission and the requesting carrier that provides information sufficient on its face, or by reference to attached documents, to determine the particular service or services to be terminated, discontinued or abandoned, will be adequate. Section 731.900 also does not require multiple notices if more than one particular wholesale service is being terminated to a particular requesting carrier. ICC Staff Ex. 6.0 at 4.

Section 731.900 is contained under Subpart I titled "Provisions Applicable to All Carriers." Thus, Section 731.900 applies to all carriers providing wholesale services, including Level 1, Level 2, Level 3 and Level 4 carriers. ICC Staff Ex. 6.0 at 4. By its terms, Section 731.900 applies to any situation where a provisioning carrier is terminating wholesale service to a requesting carrier for any reason. ICC Staff Ex. 6.0 at 4. Section 731.900 provides that the notice requirement does not apply to interruptions of service due to Wholesale Service Emergency Situations. ICC Staff Ex. 6.0 at 4. Unlike Section 731.420 of Subpart D (Level 1 carriers) and Section 731.630 of Subpart F (Level 2 carriers), Subpart I does not provide for carriers to amend any of the standards and requirements contained in Section 731.900. ICC Staff Ex. 6.0 at 4-5. Further, Sections 731.420 and 731.630 do not by their terms apply to the requirements of Subpart I. ICC Staff Ex. 6.0 at 5.

The last sentence of Section 731.900 provides that "[n]othing in this Section 731.900 shall be construed to abrogate or diminish the rights and obligations of a carrier

under the Public Utilities Act or Commission rules (including without limitation Section 13-406 of the Public Utilities Act and Code Part 735)." Section 731.900 is intended to provide an additional minimum notice requirement for the termination of wholesale service. The last sentence of Section 731.900 is intended to make clear that Section 731.900 should not be construed and is not intended to abrogate or diminish any other rights or obligations of provisioning carriers, requesting carriers and end users under the Public Utilities Act and Commission rules. ICC Staff Ex. 6.0 at 5.

IV. STAFF'S PROPOSED RULE IS CONSISTENT WITH THE MANDATORY TARIFFING REQUIREMENTS OF THE PUBLIC UTILITIES ACT

Staff's Proposed Rule contains language clearly indicating that wholesale service quality plans shall be treated as and filed as tariffs. *See* Sections 731.200, 731.210. This language is consistent with and required by the requirements of the PUA. Section 13-501 of the PUA provides, in relevant part, as follows:

> No telecommunications carrier shall offer or provide telecommunications service unless and until a tariff is filed with the Commission which describes the nature of the service, applicable rates and other charges, terms and conditions of service, and the exchange, exchanges or other geographical area or areas in which the service shall be offered or provided.

220 ILCS 5/13-501. Thus, Section 13-501 of the PUA clearly prohibits telecommunications carriers from offering or providing telecommunications services in the State of Illinois without first filing a tariff describing the rates, charges, terms and conditions thereof. Id.

There can be no argument that a wholesale service quality plan constitutes part of the rates, charges, terms or conditions of a telecommunications service. Section 13-203 of the PUA broadly defines "telecommunications service" as follows:

> "Telecommunications service" means the provision or offering for rent, sale or lease, or in exchange for other value received, of the transmittal of information, by means of electromagnetic, including light, transmission with or without benefit of any closed transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) used to provide such transmission **and includes access and interconnection arrangements and services.**

220 ILCS 5/13-203 (emphasis added). The PUA gives a similarly broad meaning to the term "rate":

> "Rate" includes every individual or joint rate, fare, toll, charge, rental or other compensation of any public utility or any two or more such individual or joint rates, fares, tolls, charges, rental or other compensation of any public utility or any schedule or tariff thereof, **and any rule, regulation, charge, practice or contract relating thereto**.

220 ILCS 5/3-116 (emphasis added).

Sections 731.200, 731.210, 731.220, and 731.230 of Part 731 are all contained in Subpart B of Staff's Proposed Rule, and only apply to Level 1 carriers as defined in Staff's Proposed Rule at Section 731.115. Under Staff's Proposed Rule, Level 1 carriers are required to file a Wholesale Service Quality Plan for review and adoption by the Commission. The main purpose of the tariff requirements in Sections 731.200, 731.210, 731.220, and 731.230 is to make clear that these Wholesale Service Quality Plans shall be filed and treated as a tariff or tariffs.

While tariffs do govern the rates and charges a carrier may assess to their customers for services provided, that is not the sole function of a tariff. Pursuant to Section 9-102 of the PUA, tariffs also contain rules, regulations, storage or other charges, privileges and contracts for the provision of services. Section 13-501(a) of the PUA requires tariffs to describe the nature of the service, applicable rates and other charges, terms and conditions of service and the exchange, exchanges or other

geographical area or areas in which the service shall be offered or provided. Section 9-104 of the PUA requires a tariffing of any service, product or commodity to include the relevant rates and other charges and classifications, rules and regulations. In addition, Section 3-116 of the Public Utilities Act defines "rate" to include "every individual or joint rate, fare, toll, charge, rental or other compensation of any public utility or any two or more such individual or joint rates, fares, tolls, charges, rental or other compensation of any public utility or any schedule or tariff thereof, and any rule, regulation, charge, practice or contract relating thereto. As a result, the tariffing of wholesale service quality plans falls under the scope of terms and conditions of service under Section 9-102.

Staff's Proposed Rule requires that Level 1 carriers tariff their Wholesale Service Quality Plan. Section 9-102 of the Public Utilities Act states, in part: "Every public utility shall file with the Commission and shall print and keep open to public inspection schedules showing all rates and other charges, and classifications…" In addition, this section also states "Every public utility shall file with and as a part of such schedule and shall state separately all rules, regulations, storage or other charges, privileges and contracts that it any manner affect the rates charged or to be charged for any service. Such schedule shall be filed for all services performed wholly or partly within this State…"

> Other sections of the Public Utilities Act also apply in this instance. Section 9-104 states, in part, "No public utility shall undertake to perform any service or to furnish any product or commodity unless or until the rates and other charges and classifications, rules and regulations relating thereto, applicable to such service, product or commodity, have been filed and published in accordance with the provisions of this Act."

With respect to telecommunications carriers, Section 13-501 of the PUA provides, in part, as follows:

> No telecommunications carrier shall offer or provide telecommunications service unless and until a tariff is filed with the Commission which describes the nature of the service, applicable rates and other charges, terms and conditions of service, and the exchange, exchanges or other geographical area or areas in which the service shall be offered or provided.
>
> 220 ILCS 5/13-501.

The language of Section 13-501 of the PUA clearly prohibits telecommunications carriers from offering or providing telecommunications services in the State of Illinois without first filing a tariff describing the rates, charges, terms and conditions thereof. Section 13-203 of the PUA broadly defines "telecommunications service" as follows:

> "Telecommunications service" means the provision or offering for rent, sale or lease, or in exchange for other value received, of the transmittal of information, by means of electromagnetic, including light, transmission with or without benefit of any closed transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) used to provide such transmission and includes access and interconnection arrangements and services.
>
> 220 ILCS 5/13-203.
>
> The PUA gives a similarly broad meaning to the term "rate":
>
> "Rate" includes every individual or joint rate, fare, toll, charge, rental or other compensation of any public utility or any two or more such individual or joint rates, fares, tolls, charges, rental or other compensation of any public utility or any schedule or tariff thereof, and any rule, regulation, charge, practice or contract relating thereto.
>
> 220 ILCS 5/3-116.

It is Staff's view that the Wholesale Service Quality Plans to be filed by Level 1 carriers contain rates, charges, terms and conditions that must be tariffed within the meaning and scope of Sections 3-116, 13-203, and 13-501 of the PUA.

Further support for this conclusion is contained in Section 13-503 of the PUA that provides as follows:

> With respect to rates or other charges made, demanded or received for any telecommunications service offered, provided or to be provided, whether such service is competitive or noncompetitive, telecommunications carriers shall comply with the publication and filing provisions of Sections 9-101, 9-102, and 9-103.
>
> 220 ILCS 5/13-503.

Also, under Section 13-101 of the PUA:

> Except to the extent modified or supplemented by the specific provisions of this Article, the Sections of this Act pertaining to public utilities, public utility rates and services, and the regulation thereof, are fully and equally applicable to noncompetitive telecommunications rates and services, and the regulation thereof, except where the context clearly renders such provisions inapplicable. Except to the extent modified or supplemented by the specific provisions of this Article, Articles I through V, Sections 8-301, 8-505, 9-221, 9-222, 9-222.1, 9-222.2, 9-250, and 9-252.1, and Articles X and XI of this Act are fully and equally applicable to competitive telecommunications rates and services, and the regulation thereof . . . .
>
> 220 ILCS 5/13-503.

Finally, Section 13-504 of the PUA provides, in part, as follows:

> (a) Except where the context clearly renders such provisions inapplicable, the ratemaking provisions of Article IX of this Act relating to public utilities are fully and equally applicable to the rates, charges, tariffs and classifications for the offer or provision of noncompetitive telecommunications services . . . .
>
> 220 ILCS 5/13-504.

Staff posits that Level 1 carriers are legally required to tariff their wholesale service quality plans. In Staff's opinion, the Public Utilities Act clearly states that all rates, rules, regulations and terms and conditions for the provision of service must be included in the company's tariffs on file at the Illinois Commerce Commission. The tariff governs the services offered, the rates charged for such services as well as all

applicable rules and regulations. Companies are precluded from offering services at rates or terms other than those contained in their tariffs.

In addition, Staff recommends that wholesale service quality plans be tariffed for policy reasons. Tariffs are a public document generally available to consumers as well as all other carriers. Tariffs are documents that can be modified or expanded readily to reflect changes in the competitive environment. Having the Wholesale Service Quality Plans tariffed assures that changes cannot be made to the plans by the Level 1 carriers without Commission oversight, thereby allowing comments and input from connecting carriers. Staff Exhibit 3.0 at 6.

Section 731.220 requires that certain documentation be provided by the Level 1 carriers in support of their initial tariff filings, as well as the biennial filings. Similarly, the Level 1 carriers would be required to pre-file direct testimony and exhibits in support of any tariff filings pertaining to their wholesale service quality plans. Precedent for the pre-filing of supporting documentation for tariffs can be found in Code Part 285. Code Part 285 establishes the Standard Filing Requirements for Electric, Gas, Telephone, Water and Sewer Utilities in Filing for an Increase in Rates and requires extensive pre-filing of supporting documentation. At the time a tariff is submitted requesting a general increase in rates, the utility company is required to pre-file written testimony, exhibits, schedules and working papers. Similar documentation should accompany tariffs establishing the wholesale service quality plans. Staff recommends these documentation requirements be adopted not only for pragmatic reasons but because these plans, as submitted by Level 1 carriers, could have a significant impact on other carriers.

In order to effectively evaluate these tariffs, Staff points out that it is necessary to have supporting documentation from the Level 1 carrier in support of the filings. In particular with the initial tariff filing, Staff's Proposed Rule (Section 731.210) sets forth an expedited proceeding for the approval of the Wholesale Service Quality Plans in three months from the filing date. The pre-filing of supporting documentation will streamline the process of reviewing the tariff filings, and will allow other carriers to comment on the tariffs.

Level 1 carriers would be allowed to file modifications or additions to their tariffed plans at any time that such modifications or additions were appropriate, rather than only at the initial filing and biennial filings. For revisions to the tariffed plans submitted at intervals other than the initial filing and biennial filings, Level 1 carriers would only need to provide the supporting documentation that typically accompanies a standard noncompetitive tariff filing. Staff's Proposed Rule does not require that testimony and exhibits accompany every tariff filing.

Initially, Staff had concerns regarding the notification of other interested parties in the event revised tariffs are submitted by Level 1 carriers at times other than the biennial review. Staff believes, however, that the notice requirements contained in 83 Ill. Adm. Code Part 255 as well as the "Change Management Process" currently utilized by the Level 1 carriers would offer sufficient notification to the other interested carriers. Interested parties would then have the opportunity to provide to Staff any input defining concerns regarding a pending tariff filing, and problematic filings could be suspended in accordance with Section 9-201(b) of the PUA.

With respect to Level 2 carriers, proposed Part 731 does not contain a similar tariff requirement. Subpart F of Staff's Proposed Rule sets forth the specific standards and remedies applicable to Level 2 carriers. Those provisions apply to Level 2 carriers regardless of whether a carrier incorporates the specific standards and remedies into a tariff. However, Staff notes that carriers are required to comply with applicable tariffing requirements set forth in the Public Utilities Act.

Verizon has offered alternative language to replace Staff's proposed Section 731.200. Mr. Agro's alternative language would allow Level 1 carriers to submit their wholesale service quality plan to the Manager of the Telecommunications Division rather than filing a tariff. This alternative is not acceptable to Staff. Information provided at staff level, such as a submission to the Manager of the Telecommunications Division, is not an official filing with the Commission. As such, the documents would not be public information. In addition, it is questionable whether or not such submissions would represent binding obligations of the carrier if they remain untariffed. Receipt of tariffs or docketed items are listed on the Commission's Daily Filings reports posted on the website thereby automatically informing all interested parties of any submissions. There is no procedure in place for notifying interested parties when a document is submitted at staff level.

In addition, as explained above and in Staff's direct testimony, tariffing of wholesale service quality plans is required pursuant to various provisions of the Public Utilities Act. Staff Exhibit 3.0 at 4-6. If the wholesale service quality plan were to be provided to the Manager of the Telecommunications Division, there would be no means for interested parties to comment on proposed changes. In order to provide notification

to all interested parties and gather comments, the Staff would be required to recommend to the Commission that a formal investigation be opened. This would result in a greater burden to both staff and the companies involved.

In Ms. Raynor's testimony, she states that tariffing "increases the administrative burden and renders any plan less flexible…" Verizon Ex. 1.0, lines 103 & 104. Staff disagrees with this contention. While the initial inclusion of the wholesale service quality plans into a tariff may pose some administrative burden, maintaining the tariff document after the initial filing is no more burdensome than submitting the document to the staff in any other format. As to the statement that tariffing the plan renders it less flexible, Staff strongly disagrees. Tariffs are documents that are changed at will by the company subject to the Commission's authority to suspend and investigate a tariff. There is no limitation to the amount or scope of changes that can be made to any tariff. Any changes in the marketplace can be addressed easily in the tariffs.

In both Mr. Agro's and Ms. Raynor's testimony, Verizon argues that Verizon's currently effective incentive plan could be incorporated by reference into their future interconnection agreements. Verizon Ex. 2.0, lines 249 – 254; Verizon Ex. 1.0, lines 195 – 201. Staff, however, does not agree that incorporating the incentive plan by reference into future interconnection agreements is a satisfactory alternative to tariffing of the wholesale service quality plans, for several reasons.

First, existing Interconnection agreements may not specifically incorporate the incentive plan; secondly, other carriers may want to buy services out of the tariffs rather than through an interconnection agreement; and lastly, the incentive plan would be subject to revision with each negotiation. Having the plan individually negotiated with

each separate interconnection agreement is time consuming and could lead to discriminatory treatment. In addition, Section 13-712(g) is a state law requirement for a wholesale service quality rule. Similarly, the requirement to tariff a wholesale service quality plan is a state law requirement. Although it may be appropriate to incorporate wholesale service quality plans into interconnection agreements, such action would not satisfy the state law requirement to tariff such a plan.

V. RESPONSE TO SPECIFIC ARGUMENTS AND PROPOSALS

Many parties raised arguments and counter proposals to Staff's Proposed Rule in their testimony. In many cases, it is obvious that those arguments and proposals are based on legal positions not set forth in the testimony. In general, Staff has chosen not to respond to those incomplete arguments, and will respond fully after seeing the full arguments in parties' briefs. Any silence on Staff's part in this initial brief should not be construed as agreement to such proposals and arguments. Nevertheless, there were certain arguments raised which Staff believed it could address and those are set forth below.

The following issues were raised by various witnesses:

1. Creating wholesale service quality rules that apply to all carriers equally.
2. Limiting the wholesale services covered to "Basic Local Exchange Service" only.
3. Having different levels of service quality rules.
4. Exemption of CLECs through Level 4 designation.
5. Addition of Section 731.900, Notice of Termination of Wholesale Service.
6. Miscellaneous Issues, including audits, Section 731.805, threshold levels, and other issues.

See ICC Staff Ex. 7.0 at 2.

A. Whether Wholesale Service Quality Rules Under Section 13-712(g) May Distinguish Between Carriers For Any Purpose

Staff understands that certain carriers object to the structure of Staff's Proposed Rule. Staff's proposed rule implements Section 13-712(g) of the PUA by recognizing four carrier levels with different requirements applied to each level with respect to carrier to carrier wholesale service quality rules. ICC Staff Ex. 7.0 at. 2. Based on Ameritech Illinois' proposals and comments, Ameritech appears to contend that the wholesale service quality rules should not distinguish between carriers for any purpose, and that such rules must be "basic" – or lowest common denominator – because the rules must apply on a rigid one size fits all basis. *See* ICC Staff Ex. 7.0 at 2-3. In short, Ameritech contends that wholesale service quality rules should apply equally and without variation to all local exchange carriers. *See* ICC Staff Ex. 7.0 at 3. Staff disagrees with any such contention. *Id*.

There is no question that Section 13-712(g) refers to "carrier to carrier" rules in directing the Commission to "establish and implement carrier to carrier wholesale service quality rules". Indeed, it is Staff's position that under Section 13-712(g) the Commission has the ability to proscribe rules applicable to all carriers providing wholesale services to another carrier. However, the language of Section 13-712(g) is very broad, and contains no restrictions or limitations on the Commission's obligation and authority to establish carrier to carrier wholesale service quality rules as suggested by Ameritech's position. It does not follow from the language of Section 13-712(g) that all carriers must be treated exactly the same. Staff submits that the legislature's intent in issuing a broad mandate to the Commission to adopt wholesale service quality rules

was to allow the Commission substantial discretion to use its expertise to enact rules tailored to develop and nurture the emerging competitive local telecommunications market. Illinois courts, moreover, have long held that an express statutory grant of authority to an administrative agency also includes the authority to do what is "reasonably necessary" to accomplish the legislature's objective. *Lake Co. Board of Revenue v. Property Tax Appeal Bd.*, 119 Ill. 2d 419, 427 (1998); *Abbott Labs v. Illinois Commerce Comm'n*, 289 Ill. App. 3d 705, 712 (1997). Further, reasonable discretion is afforded administrative agencies so they can "accomplish in detail what is legislatively authorized in general terms." *Lake Co. Bd. Of Revenue,* 119 Ill. 2d at 428.

The language of Section 13-712(g) indicates that the legislature gave the Commission very broad authority to address an extremely complicated subject. Section 13-712(g) provides, in its entirety, as follows:

> The Commission shall establish and implement carrier to carrier wholesale service quality rules and establish remedies to ensure enforcement of the rules.

220 ILCS 5/13-712(g). There is no specific direction to the Commission other than for the Commission to establish and implement carrier to carrier wholesale service quality rules and establish remedies. The legislature neither mandated nor limited the Commission's ability to consider particular services, company size, level of competition, business rules, benchmarks, parity, disaggregations, statistical methods, or any of the other many issues that have to be considered in the development of wholesale service quality standards. In short, based on the broad and general language of Section 13-712(g), the legislature expected the Commission to use its expertise and judgment in developing reasonable wholesale service quality rules.

Reliance on the retail service quality provisions and requirements of Section 13-712 to support a one size fits all approach for wholesale service quality rules would be misplaced. Paragraphs (c) through (f) of Section 13-712 set forth service quality requirements for retail service. Each of those paragraphs establishes that the retail service quality requirements are limited to "basic local exchange service", as that term is defined in Section 13-712(b), by specifically using the term "basic local exchange service".[2] No such limitation is contained in Section 13-712(g) which requires the Commission to establish wholesale service quality rules – there, the legislature made no mention of the term "basic local exchange service". Clearly, if the legislature intended to somehow limit wholesale service quality rules to "basic local exchange service", it would have added the words "for basic local exchange service". It did not, and the meaning of that omission is obvious – wholesale service quality rules are not so limited.

It is a fundamental principle of statutory construction embodied in the maxim *expressio unius est exclusio alterius* that the enumeration of one thing in a statute implies the exclusion of all other things not mentioned. *See e.g., Baker v. Miller*, 159 Ill. 2d 249 (1994). The exclusion of the phrase "basic local exchange service" in subsection 712(g) and the use of "wholesale service quality rules" in its stead, clearly

[2] For example, Section 13-712(c) provides that "[t]he Commission shall promulgate service quality rules for **basic local exchange service** . . . ." 220 ILCS 5/13-712 (emphasis added). Section 13-712(d) provides that "[t]he rules shall, at a minimum, require each telecommunications carrier to do all of the following: (1) Install **basic local exchange service** with 5 business days . . .[,] (2) Restore basic local exchange service for a customer within 24 hours . . . [,] (3) Keep all repair and installation appointments for **basic local exchange service** . . . ." *Id*. (emphasis added). Section 13-712(e) provides that "[t]he rules shall include provisions for customers to be credited by the telecommunications carrier for violations of **basic local exchange service** quality standards as described in subsection (d)." *Id*. (emphasis added). Finally, Section 13-712(f) provides that "[t]he rules shall require each telecommunications carrier to provide . . . a public report that includes performance data for **basic local exchange service** quality of service." *Id*. (emphasis added)

implies that the General Assembly did not intend to limit the Commission's authority under § 712(g) to basic local exchange services but, rather, that the General Assembly gave the Commission a wide grant of authority to implement wholesale service quality rules and establish remedies to enforce these rules.

Reliance on Section 13-712(a) would be similarly misplaced. Section 13-712(a) describes the legislature's intent "that every telecommunications carrier meet minimum service quality standards in providing basic local exchange service on a non-discriminatory basis to all classes of customers." 220 ILCS 5/13/712(a). As noted above, the legislature consistently tied "retail" requirements to basic local exchange service, but did not tie "wholesale" requirements to basic local exchange service (as noted above, Section 13-712(g) sets forth the requirements for "carrier to carrier" wholesale service quality rules and contains no reference to "basic local exchange service" or "customers"). Thus, although Section 13-712(a) sets forth an expression of legislative intent regarding service quality standards applicable to basic local exchange service, it is not applicable to the requirement set forth in Section 13-712(g) to establish wholesale service quality rules. This conclusion is further supported by the fact that Section 13-712(a) refers to "classes of customer", a retail concept[3] not applicable to wholesale carrier to carrier services.

An argument might also be advanced that the one size fits all approach is supported by the reference to "minimum service quality standards" in Section 13-712(a). To the contrary, even assuming that Section 13-712(a) applied to the wholesale

[3] The most common and general distinction between "customer classes" is between "business" and "residential" customers. *See* 220 ILCS 5/13-218 and 13-219.

requirements at issue, the reference to minimum standards would not be dispositive. Staff's rule – including the requirement for Wholesale Service Quality Plans for Level 1 carriers – is intended to set minimum standards applicable to each Level. The real issue raised by Ameritech's position is not whether minimums are required – rather, this issue raised by Ameritech's position is whether all carriers must be treated exactly the same.

Ameritech's position that this Commission should adopt one set of performance rules to apply without variation to all carriers is illogical and unreasonable. ICC Staff Ex. 7.0 at. 5. Ameritech's position fails to recognize the differences among carriers, both in terms of their systems and in terms of their impact on and importance to developing and maintaining a competitive local telecommunications market. ICC Staff Ex. 7.0 at. 5. For example, Ameritech currently controls approximately 80 percent of the access lines in Illinois and accounts for virtually all of the wholesale services provisioned in Illinois. ICC Staff Ex. 7.0 at. 5. As the leading provider of wholesale services in Illinois, Ameritech has developed extensive systems, both electronic and manual, to provision wholesale services and monitor its performance in provisioning such services. ICC Staff Ex. 7.0 at. 5. On the other hand, the demand for and provisioning of wholesale services in the service territories of smaller carriers is nowhere near the level in Ameritech's territory, and the systems used to provision those wholesale services are often manual and in any event far less sophisticated than Ameritech's systems. ICC Staff Ex. 7.0 at. 5-6. In Staff's opinion, a rule containing a single set of performance measures and standards that would be workable for small ILECs would be inadequate for a larger carrier such as Ameritech. ICC Staff Ex. 7.0 at. 6. Conversely, a rule containing a single set of

performance measures and standards that would be appropriate for a carrier such as Ameritech would likely be unduly burdensome and unworkable for smaller carriers. ICC Staff Ex. 7.0 at. 6. Even for comparable carriers, differences in systems and service territories would reasonably call for differing service quality standards. ICC Staff Ex. 7.0 at. 6. Accordingly, Ameritech's position and proposal to require a single set of wholesale service quality rules applicable to all carriers is both illogical and unreasonable, and must be rejected.

Staff's Revised Final Draft Rule does not treat all local exchange carriers the same. Staff believes this is appropriate because there are vast differences in the characteristics of local exchange carriers operating in the state of Illinois. One carrier has approximately 80% of the access lines in the state. Contrast this carrier with another carrier that has a rural exemption, and the "one size fits all" approach to wholesale service quality rules advocated by Ameritech is immediately and obviously unworkable. Due to the considerable expense, there should be no expectation that a local exchange carrier with 1,000 access lines and no resold services has to have the same operations support systems and reporting capabilities as a local exchange carrier with millions of access lines and many resold services.

B. Whether The Wholesale Service Quality Rules Must Be Limited To "Basic Local Exchange Service" Only.

Three parties objected to the Staff's proposed rule not limiting itself to "Basic Local Exchange Service" only. Mr. Panfil (Ameritech Illinois Ex. 1.0, pp. 17-24), Ms. Faye Raynor (Verizon Ex. 1.0, 10-11), and Mr. Kenneth Mason (Citizen's Ex. 2.0, pp. 9-10) all assert that since the heading for Section 13-712 contains "Basic Local Exchange Service," that Section 13-712(g) must statutorily be limited to basic local exchange

service. Staff disagrees with any contention that Code Part 731 should be limited to Basic Local Exchange Service only. See ICC Staff Ex. 7.0 at 7-8.

As explained above, the language of Section 13-712 indicates that the legislature referred to basic local exchange service in the context of retail service quality requirements, not wholesale service quality requirements. The requirement to establish carrier to carrier wholesale service quality rules set forth in Section 13-712(g) is not limited to "basic local exchange service". Section 13-712(g) contains no reference to basic local exchange service. ICC Staff Ex. 7.0 at 8. Further, as explained above, the language of Section 13-712(g) leads to the conclusion that it allows the Commission a great deal of latitude to determine what should be covered in this rulemaking, and in what manner. Although Section 13-712 does contain the words "basic local exchange service" in its heading, it is a well established rule of statutory construction that in interpreting the meaning of a particular section, the plain meaning of the substantive provisions of the section cannot be limited by its heading. *People v. Trigg*, 97 Ill. App. 2d 261, 270 (1st Dist. 1968).

Additionally, it is clear that carriers purchasing wholesale services need the wholesale service quality measures to cover more than just basic local exchange service to help facilitate the competitive environment in Illinois. ICC Staff Ex. 7.0 at 8. For example, many carriers assert that they need wholesale service quality standards for special access measures. *Id*. The point here is that to restrict the wholesale measures to basic local exchange service would be to eliminate a range of services needed by many CLECs to foster and protect competition. Such a construction of

Section 13-712 is contrary to the pro-competitive goals of HB 2900, of which Section 13-712 was a part.

C. Whether The Wholesale Service Quality Rules May Have Different Levels Of Service Quality Rules.

Two ILECs commented on the concept of levels. Ameritech Illinois argued that the concept of having different levels of service quality rules was inappropriate. ICC Staff Ex. 7.0 at 9. Ameritech Illinois' witness, Mr. Eric Panfil, contended that Staff's proposal runs directly counter to the mandate that the Commission establish and implement carrier to carrier wholesale service quality standards and remedies that are broadly applicable to every telecommunications carrier. Ameritech Illinois Ex. 1.0, pp. 9-14. Conversely, Citizen's witness Mr. Kenneth Mason, representing another ILEC, stated that he "…believes that the proposed Part 731 Rules should be based on multiple "levels" or "tiers" depending upon the LEC's number of access lines in Illinois and the volume of wholesale interconnection activity experienced by the LEC. Citizen's Ex. 2.0, pp. 11-12. Another Citizen's witness, Mr. Kim Harber, testified that "[a] multi-tier structure is logical because the vast majority of competitive and wholesale activity is occurring in the service areas of the two largest ILECs in Illinois. Citizen's Ex. 1.0, p. 11. To Staff's knowledge, all of the other parties in this proceeding are in agreement with the concept of utilizing levels in Part 731. ICC Staff Ex. 7.0 at 9.

This issue is essentially the same as the arguments addressed in Section A above, which will not be repeated here. Staff disagrees with any contention that there is a "statutory mandate" or other proscription against the utilization of levels. Levels represented the primary mechanism through which Staff could develop a rule that "adjusted" to fit the circumstances of the particular local exchange carrier. ICC Staff Ex.

7.0 at 10. The Commission has wide discretion to make reasonable classifications in its administrative rules and to treat entities differently based upon the classifications.

In other rulemaking efforts, this Commission has classified and differentiated based on factors including revenue, number of access lines, and different technologies. Examples include, but are not limited to, the following:

- Code Part 220, (Reports of Accidents by Fixed Public Utilities Other then Pipelines Transporting Liquids), the Commission classified utilities as Class A, Class B, and Class C, based upon the utilities' annual gross revenue.

- Code Part 285, (Standard Filing Requirements), the Commission classified utilities into Large, Medium, and Small based upon gross annual revenue. The rule requires different minimum filing requirements based upon the classification.

- Code Part 711, (Cost Allocation for Large Local Exchange Carriers), the rule is only applicable to carriers with over 15,000 lines.

- Code Part 715, (Uniform System of Accounts for Cellular Carriers), the rule is only applicable to "…telephone utilities that provide communications service by utilizing cellular radio technology..," establishing that technology has been used as a method of differentiating carriers.

- Code Part 790, (Special Access and Private Line Interconnection Rules), is only applicable to "Tier 1 LECs," which is described as those LECs having over $100 million or more of revenue from regulated telecommunications service.

See ICC Staff Ex. 7.0 at 10. There can be no question that the Commission has often implemented rules that have classified carriers and provided for different treatment based on factors including revenue, number of access lines, and different technologies. This historical precedent is both applicable and reasonable here. The Legislature provided the Commission a great deal of latitude to use its expertise and judgment to develop appropriate wholesale service quality rules. Staff has provided testimony that Staff's Proposed Rule is an appropriate and balanced wholesale service quality rule with fair remedies, and Staff's Proposed Rule should be adopted by the Commission.

Ameritech's proposal is also contrary to the legislative history for Section 13-712(g). That history indicates that:

> it is not the intent of the General Assembly for the service quality standards found in Section 13-712 of house Bill 2900 to preempt or supercede the service quality standards already imposed upon SBC-Ameritech under its merger order agreement with the Illinois Commerce commission and the Federal Communications Commission. It is the intent of the General Assembly for the service quality standards found in Section 13-712 to supplement or add to those service quality standards SBC-Ameritech must already adhere to under its merger order agreement with the ICC and FCC.

Remarks of Representative Hamos, 92nd General Assembly, House of Representatives, Transcription Debate, 69th Legislative Day, May 31, 2001, at 34-35. Ameritech's position that Section 13-712(g) requires something far short of its merger order remedy plan is thus contrary to the clear indication from the legislature that the wholesale services quality rules required by Section 13-712(g) would **supplement** or **add** to the service quality plans Ameritech was subject to pursuant to the ICC and FCC merger orders.

D. Whether Staff's Proposed Rule Inappropriately Exempts CLECs Through A Level 4 Designation

Two parties, Ameritech Illinois and Verizon, argued that it was inappropriate to exempt CLECs through the Level 4 designation. *See* Ameritech Illinois Ex. 1.0 at 15-17; Verizon Ex. 2.0 at 14-16. Staff disagrees. *See* ICC Staff Ex. 7.0 at 11-13. First, Staff's Proposed Rule includes provisions automatically applicable to CLECs, as discussed in Staff witness Alcinda Jackson's testimony. *See* ICC Staff Ex. 7.0 at 12. Staff's Proposed Rule includes requirements for all telecommunications carriers regarding customer service records, loss notification, and unbundled loop return. *Id*. Further, Section 731.805 of Staff's proposed rule allows the Commission to apply Level

2 requirements to a CLEC that receives a bona fide request for wholesale services after consideration of certain factors. See *Id*.

Second, as discussed above, it is clear that the Legislature intended to facilitate and nurture the competitive telecommunications environment. These wholesale service quality standards, by their very nature, are designed to protect purchasers of wholesale services through information (i.e., reports to the purchaser or Commission to initiate an action, if necessary) or direct monetary remedies. They reflect the Legislature's concern that telecommunications carriers be able to purchase wholesale services at an acceptable quality level.

The reality in the current Illinois market is that most of the underlying facilities are in the control of ILECs. ICC Staff Ex. 7.0 at 12. Even Ameritech Illinois witness Mr. Panfil acknowledged that CLECs perform fewer wholesale functions than ILECs. *See* Ameritech Illinois Ex. 1.0, p. 16. Accordingly, it is primarily the ILECs performance that needs to be monitored and corrected when necessary. ICC Staff Ex. 7.0 at 12. There is no requirement that the Commission must address every conceivable problem in order to pass a rule addressing wholesale service quality. Further, the biennial review of rules will enable this Commission to determine if and when more wholesale performance measures should be made applicable to CLECs. Finally, Staff notes that Staff's Proposed Rule envisions and prescribes, in Section 731.805, a specific process for CLECs to be moved from a Level 4 firm to a Level 2.

Several general principles recur throughout judicial discussions of legislative and administrative classifications, and they provide some guidance here in considering the validity of the proposed distinctions among wholesale service providers. First, in

making a classification for economic or regulatory purposes, a legislature or other body does not have to act with mathematical exactitude in drawing a line between those who are subject to the measure and those who are not. In City of New Orleans v. Dukes, 427 U.S. 297, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976) (per curiam), the Supreme Court upheld a New Orleans ordinance that barred street vendors from selling food in the French Quarter in that city unless they had done so for eight or more years. Rejecting an equal protection challenge to the measure brought by a vendor who had been in business in that location for only two years, the Court explained, "States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude." Dukes, 427 U.S. at 303, 49 L. Ed. 2d at 517, 96 S. Ct. at 2517. See also United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 179, 66 L. Ed. 2d 368, 378-79, 101 S. Ct. 453, 461 (1980) (Classification "'inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line,' [citation] and the fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration").

Second, government may proceed one step at a time in imposing regulations in a specific area, and may choose to direct its initial efforts where it discerns the greatest need; there is no constitutional requirement that a regulatory scheme be complete and final the moment it goes into effect. In Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 99 L. Ed. 563, 75 S. Ct. 461 (1955), the Supreme Court addressed the validity of an Oklahoma statute that limited the fitting or replacement of lenses into eyeglasses to licensed ophthalmologists or optometrists or to persons using prescriptions issued by

members of those professions; at the same time, the statute exempted from those restrictions sellers of ready-to-wear glasses. The Court rejected an equal protection challenge to this legislative scheme, explaining:

> "Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. [Citation.] Or the reform may take on step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. [Citation.] The legislature may select one phase of one field and apply a remedy there, neglecting the others. [Citation.] The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. We cannot say that that point has been reached here. For all this record shows, the ready-to-wear branch of this business may not loom large in Oklahoma or may present problems of regulation distinct from the other branch."

Williamson, 348 U.S. at 489, 99 L. Ed. at 573, 75 S. Ct. at 465.[4]

Third, economic or business classifications made by government must generally be evaluated with a heavy measure of deference, and a court evaluating a provision challenged on equal protection grounds will sustain the classification if there is any conceivable basis on which to do so. In Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 66 L. Ed. 2d 659, 101 S. Ct. 715 (1981), the Court considered a Minnesota statute that banned, for environmental reasons, the sale of milk in plastic nonreturnable, nonrefillable containers, but permitted its sale in other types of nonreturnable, nonrefillable containers, such as paperboard cartons. A number of parties challenged the statute, arguing, among other things, that evidence showed that the statute would in

[4] Applying similar reasoning in the context of intercarrier compensation, the FCC recently rejected "the notion that it is inappropriate to remedy some troubling aspects of intercarrier compensation until we are ready to solve all such problems. In the most recent of our access charge reform orders, we recognized that it is 'preferable and more reasonable to take several steps in the right direction, even if incomplete, than to remain frozen' pending 'a perfect, ultimate solution.'" *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, Order on Remand and Report and Order, FCC 01-131, ¶ 94 (rel. Apr. 27, 2001)

reality be environmentally harmful rather than beneficial. The Supreme Court declined, however, to weigh the evidence on the two sides of the question, explaining:

> "But States are not required to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisonmaker.' [Citations.]
>
> "Although parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational {citation], they cannot prevail so long as 'it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable.' [Citation.] Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken." Clover Leaf Creamery, 449 U.S. at 464, 66 L. Ed. 2d at 668-69, 101 S. Ct. at 724.

Moreover, it is not necessary that the suggested rationale have actually motivated the body that passed the provision. "[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." Federal Communications Commission v. Beach Communications, Inc., 508 U.S. 307, 315, 124 L. Ed. 2d 211, 222, 113 S. Ct. 2096, 2102 (1993). Application of these precepts to the suggested classification here supports the conclusion that the classification survives equal protection scrutiny.

E. Notice of Termination of Wholesale Service.

Mr. Eric Panfil (Ameritech Illinois Ex. 1.10), Mr. Daniel Meldazis (Focal Testimony of Daniel Meldazis), and Ms. Faye Raynor (Verizon Ex. 3.0) provided supplemental direct testimony addressing Section 731.900. Mr. Panfil opposed the addition of Section 731.900, Mr. Meldazis supported the addition of Section 731.900 but suggested

the notification interval be increased to 40 days, and Ms. Raynor supported the addition of Section 731.900 but wanted to insert clarifying language that interconnection agreements should control. See ICC Staff Ex. 7.0 at 13.

Ameritech witness Mr. Panfil asserts, as an initial matter, that Part 731 is not the appropriate rule in which to address terminating notice, contending that termination notice is not a wholesale service quality issue at all. ICC Staff Ex. 7.0 at 14. Rather, Mr. Panfil contends that Part 735, Procedures Governing the Establishment of Credit, Billing, Deposits, Termination of Service and Issuance of Telephone Directories for Local Exchange Telecommunications Carriers in the State of Illinois, would be a better fit. *Id*. Mr. Panfil also states that Staff's proposal penalizes wholesale providers by increasing the amount of time they must continue to serve delinquent customers when the wholesale provider has done nothing wrong. *Id*.

Staff disagrees with the contention that notice of termination of wholesale service is an issue that is inappropriate for Part 731. ICC Staff Ex. 7.0 at 14-15. Termination of service is properly considered a component of wholesale service quality. *Id*. Section 13-712(g) states, "The Commission shall establish and implement carrier to carrier wholesale service quality rules …." There is no basis to contend that the term "rules" is intended to be restricted to measures and standards. Service termination is a "rule" properly under consideration in Part 731. Further, Staff is unaware of any provisions in Code Part 735 dealing with carrier to carrier relationships. ICC Staff Ex. 7.0 at 15.

Staff's proposed Section 731.900 is simply a notice requirement, and is not intended to penalize wholesale providers by increasing the amount of time they must continue to serve delinquent customers when the wholesale provider has done nothing

wrong. If wholesale providers are vigilant in giving the required notice, there should be no significant impact on the amount of time wholesale providers serve delinquent carriers. ICC Staff Ex. 7.0 at 15. In any event, the potential for additional bad debt is outweighed by the benefit of facilitating notice to end users that their service will be terminated through no fault of the end user. *Id*. Further, there may be situations where the purchasing carrier believes that the provisioning carrier is the carrier in default. *Id*. Section 731.900 helps ensure that notice is provided to the innocent end-user in this and other situations.

Mr. Meldazis of Focal recommends moving the time interval from 35 to 40 days. Staff continues to believe and recommend that 35 days is an appropriate time interval for termination notification. ICC Staff Ex. 7.0 at 15. Staff also disagrees with the contention by Ms. Faynor of Verizon that an interconnection agreement should take precedence over Section 731.900 of Staff's Proposed Rule. ICC Staff Ex. 7.0 at 16. Parties should not be allowed to contract around the minimum notice requirement provided for in Section 731.900. The notice is designed to protect the public interest by providing the Commission and Requesting Carrier with notice that the Provisioning Carrier intends to terminate, discontinue or abandon service. *Id*. This notice will allow the Requesting Carrier adequate time to notify an end user that his, her or its service will be terminated, and will also allow the Requesting Carrier and/or the Commission to request or take such action as may be appropriate. Providing that parties may contract around this requirement would undermine the purpose of the rule and not be in the public interest.

F. Miscellaneous Issues Including Audits, Section 731.805, Threshold Levels

1. Audits

In his direct testimony, Ameritech witness Mr. Panfil proposes wording to be used in the auditing section that will avoid requesting carriers seeking audits as a form of harassment. Ameritech Illinois Ex. 1.0, pp. 26-27. Ameritech's proposed change is not necessary. Section 731.325 of Staff's Proposed Rule does not address payment responsibility. Staff's Proposed Rule provides that the Wholesale Service Quality Plan will "…indicate responsibility for payment of audits." While Staff understand Mr. Panfil's concern about audit costs being used as a form of harassment, this concern will be addressed in the development of each Level 1 carrier's Wholesale Service Quality Plan. ICC Staff Ex. 7.0 at 17.

2. Movement of CLECs From Level 4 to Level 2

Mr. Rod Cox, McLeodUSA's and TDS Metrocom's witness, sponsored testimony seeking certainty about how the Commission would move a CLEC from a Level 4 designation to a Level 2 designation per Section 731.805. Mr. Cox's initial recommendation at page 9 to limit Section 731.815 only to situations in which the CLEC is obligated to provide wholesale services, and to completely exempt voluntary agreements by CLECs to provide wholesale services, is unacceptable. This request would effectively preclude CLECs from ever having to report wholesale service quality performance, no matter how significant their market share. See ICC Staff Ex. 7.0 at 17-18. Mr. Cox's second recommendation, to require the Commission to consider and make a determination on each of the factors listed in subsection (a) is less problematic. Staff has modified Section 731.815to contain the following wording:

> In connection with any such hearing, the Commission must consider and rule on each of the following items:

See ICC Staff Ex. 7.0 at 18.

3. Wholesale Service Quality Plans for Level 2 Carriers

Mr. Kim Harber and Mr. Kenneth Mason, both Citizen's witnesses, state at page 12 of their respective direct testimonies that Level 2 carrier's should be allowed to provide their own Wholesale Service Quality Plan for review and approval by the Commission. ICC Staff Ex. 7.0 at 18-19. Staff does not agree with this proposal. *Id*. The individual plans for Level 1 carriers are justified for several reasons including the different systems of Level 1 carriers and their importance to the emerging competitive local telecommunications market in Illinois. *Id*. Development of individual wholesale service quality plans will require the investment of time and money by both the Provisioning Carrier submitting the plan as well as Requesting Carriers that desire to comment on the plan. *Id*. An additional component of the justification for individual plans for Level 1 carriers is that the amount of competitive activity justifies the expense from the perspective of both the Provisioning Carrier and Requesting Carriers. *Id*. Allowing all Level 2 carriers the option of being treated as a Level 1 carrier would force Requesting Carriers to comment on their plans and participate in those proceedings. In Staff's view, this would place an unreasonable burden and expense on Requesting Carriers (particularly smaller CLECs) purchasing service from a Level 2 carrier. The measures and standards applicable to Level 2 carriers are reasonable minimal measures and standards. Citizen's proposal would impose an unreasonable administrative burden on Requesting Carriers and the Commission and should be rejected. *Id*.

4. Collocation Standards for Level 2 Carriers

Citizen's witness Mr. Mason, at pages 15-18 of his direct testimony, also suggests eliminating collocation from the proposed wholesale service standards for Level 2 carriers. ICC Staff Ex. 7.0 at 20. Staff does not agree with this proposal. *Id*. While Mr. Mason argues that the level of collocation activity is nominal and that the collocation standard is therefore unnecessary, the list of standards covered was originally proposed by the purchasers of wholesale services in the workshop. *Id*. Purchasers of wholesale services indicated that they needed a collocation standard in Part 731 applicable to Level 2 Carriers, and such request is reasonable.

5. Thresholds

Citizen's witness Mr. Mason contends, at page 22 of his direct testimony, that it is administratively unreasonable to subject a Level 2 carrier with minimal order activity for wholesale services to an extensive list of service quality standards and requirements, and recommends threshold levels be established. Another Citizen witness, Mr. Kim Harber, also contends at page 9 of his direct testimony that Staff has proposed extensive wholesale requirements for Level 2 Carriers. An analysis of the facts reveals that Staff's Proposed Rule does not subject a Level 2 carrier to an "extensive" list of standards. To the extent a Level 2 carrier offers or provides the service, there are five measures for Level 2 carriers, with a total of 15 standards disaggregated from those measures. ICC Staff Ex. 7.0 at 20-21. Compare that number to existing wholesale performance measure plans containing approximately 150 measures and the corresponding thousands of standard disaggegations, and it becomes clear that 15 standards cannot reasonably be considered "extensive." *Id*. The concept of threshold amounts of activity was discussed in the workshops, but parties were unable to agree

that they were appropriate. Through reduction, associated remedy amounts were revised to address the need for threshold levels. Id.

6. Level 2 Standards

At page 27, Citizen's witness Mr. Mason speculates that "[i]t appears Staff has largely relied upon information associated with the performance of Ameritech and/or Verizon to establish the Level 2 Carrier standards." Such is not the case. Ameritech's and Verizon's wholesale performance or information contained in their respective wholesale service quality plans had nothing to do with the establishment of Staff's proposed Level 2 Carrier standards. During the course of the workshop process, Staff sought the input of all participants as to what the measures should be, as well as what the associated standards should be, and developed the measures and standards with Staff's professional judgment. ICC Staff Ex. 7.0 at 21-22. Staff's list of measures and standards contained in Staff's Proposed Rule was entirely derived from that process. At no time did Staff utilize the Ameritech or Verizon wholesale service quality plans to establish measures or standards for Level 2 Carriers. *Id*.

Citizen's witness Mr. Mason further speculates at page 27 of his direct testimony that "[a]lternatively, Staff has relied upon suggestions by CLECs that have not had any experience or history ordering Unbundled Local Loops, Interconnections Trunks or Resold Local Services from Level 2 Carriers in Illinois. Staff certainly considered the input of CLECs participating in the workshops. ICC Staff Ex. 7.0 at 22. It would have been both irresponsible and negligent if Staff had tried to construct a wholesale service quality rule without the CLEC participant's input. *Id*. Consideration of CLEC input in combination with Staff's and CLEC's experiences throughout the State does not render Staff's proposal inappropriate. Staff would also note the absence of other Level 2

carriers to this proceeding. The absence of other objections on this point by other Level 2 carriers is telling.

At pages 27-34 of his direct testimony, Mr. Mason objects to Staff's proposed standards for FOCs, unbundled local loops, conditioning of loops, and interconnection trunks. Mr. Kim Harber of Citizen's also expressed concern about unbundled local loops at pages 17-21 of his direct testimony. These objections are without merit. The standards were developed through an extensive effort in the workshop process, and represent the efforts and inputs of several parties, as well as Staff's professional judgment. ICC Staff Ex. 7.0 at 22-23. These standards are reasonable and will both foster and protect the emerging competitive local telecommunications market in Illinois. *Id*.

7. Waiver for Level 2 Requirements

At pages 37-38 of his direct testimony, Citizen's witness Mr. Mason recommends the addition of waiver language from Level 2 requirements. Staff does not support or agree to this proposal. The biennial review process contemplated by Section 731.615 will enable Level 2 Carriers to seek modification to Subsection F if needed. ICC Staff Ex. 7.0 at 23. Section 731.615 already states as follows:

> To the extent the Commission finds Subpart F should be revisited for any reason prior to the end of a biennial period, the Commission may initiate a proceeding to update or amend the previously approved Subpart F. Additionally, if any carrier seeks modification to the approved Subpart F on an interim basis, they may file a petition originating a proceeding at any time.

Accordingly, there is already a mechanism to modify Subpart F on both a biennial basis or on an interim basis. *Id*. The additional waiver opportunity proposed by Citizen's will merely create an opportunity for them to re-litigate several aspects of this rule.

VI. REMEDIES

A. Commission Authority for Remedies

First, as the caption of this proceeding clearly indicates and as the Initiating Order makes even clearer, this rulemaking was initiated under the authority of § 13-712(g). *See Initiating Order*. Section 13-712(g) provides that the Commission "*shall* establish and implement carrier-to-carrier wholesale service quality rules and establish *remedies* to ensure enforcement of those rules." 220 ILCS 5/13-712(g) (emphasis added). The General Assembly, accordingly, expressly mandated that the Commission "establish remedies to ensure enforcement of" wholesale service quality rules.

The Commission, as an administrative agency, only has the authority granted to it by the legislature through the PUA. *Business and Professional People for the Public Interest v. Illinois Commerce Comm'n*, 136 Ill. 2d 192, 201, 243 (1990) ("The Commission only has those powers given it by the legislature through the Act."); *City of Chicago v. Illinois Commerce Comm'n*, 79 Ill. 2d 213, 217-18 (1980) ("The Commission's powers are derived solely from the Act, and its authority is limited by the grants of the Act."); *Commonwealth Edison v. Illinois Commerce Comm'n*, 181 Ill. App. 3d 1002, 1008 (2nd Dist. 1989). The Commission's authority, however, is not limited to only those powers that are expressly and specifically enumerated in the Act.

Illinois courts have long held that an express statutory grant of authority to an administrative agency also includes the authority to do what is "reasonably necessary" to accomplish the legislature's objective. *Lake Co. Board of Revenue v. Property Tax Appeal Bd.*, 119 Ill. 2d 419, 427 (1998); *Abbott Labs v. Illinois Commerce Comm'n*, 289 Ill. App. 3d 705, 712 (1997). Further, reasonable discretion is afforded administrative

agencies so they can "accomplish in detail what is legislatively authorized in general terms." *Lake Co. Bd. Of Revenue,* 119 Ill. 2d at 428.

It is Staff's position that the Commission can reasonably conclude that remedies with teeth are necessary to reassure and encourage CLECs to enter local exchange markets here in Illinois. Further, such remedies serve to minimize suspicion and accusations between CLECs and ILECs while also minimizing costly litigation that not only absorbs scarce CLEC time and resources but also leaves the working relationship between CLEC and ILEC uncertain. Investment capital, of course, avoids such uncertainties making it more likely that many CLECs would avoid entering into the Illinois local exchange markets. In light of the clear expressed authority by the General Assembly that the Commission "establish remedies to ensure enforcement of" wholesale service quality rules contained in § 13-712(g) and the implied authority to do what is reasonably necessary to accomplish the legislature's goals, the Commission has the authority to promulgate Part 731 as Staff has proposed.

B. Ameritech's Preexisting Plan

Ameritech claims that it agreed to Condition 30 of the Merger Order for a duration of three years and, accordingly, that its "preexisting plan" expires on October 8, 2002. Ameritech Ex. 2.0, at 12-13. Ameritech argues that, in effect, Staff is attempting to amend the term of Condition 30, long after that agreement was reached and implemented, and "even bring the plan back to life after the agreement expired" without Ameritech's consent. *Id*. Ameritech contends that Staff cannot require Ameritech to abide by such a remedy plan involuntarily. *Id*. Ameritech, consequently, proposes to offer a new "compromise" remedy plan. Staff disagrees with Ameritech's position that its preexisting plan is precluded from being adopted in this proceeding because it

expires in October of this year. In fact, Ameritech's appears to be, once again, transparently attempting to re-litigate remedy plan issues that it lost in Docket No. 01-0120 (the "Ameritech Remedy Plan Proceeding").

While the Merger Order did specifically provide for the expiration of the merger conditions (except where the conditions specifically establish other termination dates) (Merger Order at 237), the Merger Order did not provide that everything that was accomplished with respect to Condition 30 and all of the other conditions would cease to be effective upon their expiration. That interpretation would lead to the absurd result that the imposition of the merger conditions could have no lasting impact beyond their expiration. As the Commission stated in the Merger Order, the intent of the remedy plan was to provide "pro-competitive benefits for CLECs and end users in Illinois that would not exist absent the Merger". Merger Order at 228.

The Commission, moreover, in the Ameritech Remedy Plan Proceeding, while declining to extend the termination date of Condition 30, did properly hold that Ameritech could not re-litigate its remedy plan in future proceedings. More specifically, the Commission held that:

> [T]he Commission wishes to clarify that any future reference (in either concurrent or prospective dockets before the Commission) to a Remedy Plan in place in Illinois, either voluntary or pursuant to Commission Order, shall mean the remedy Plan adopted pursuant to this Order.

Order, Petition for Resolution of Disputed Issues Pursuant to Condition (30) of the SBC/Ameritech Merger Order, ICC Docket No. 01-0120, p. 20 (July 10, 2002). Staff does not know how the Commission could have made it any clearer than it did in its July 10 Order: the remedy plan adopted in Docket 01-0120 is Ameritech's preexisting plan,

whether they fully agree with the decisions the Commission made regarding that remedy plan in that docket or not.

There is no unfairness to Ameritech, moreover, in using the 01-0120 plan as the preexisting plan in this Part 731 rulemaking. Ameritech had a full and fair opportunity to address all issues presented in the 01-0120 docket regarding an appropriate remedy plan. Ameritech's arguments here in this rulemaking are an utterly unwarranted attempt to re-litigate issues that it lost in the Ameritech Remedy Plan Proceeding and should thus be disregarded.

C. Section 731.605 – Standards for Level 2 Carriers

Section 731.605 of Staff's Proposed Rule contains the measures and standards for provision of wholesale service by Level 2 carriers. Staff Ex. 4.0, at 5. Section 731.605 establishes a set level of performance for each of the Services covered by SubPart F -- Obligations of Level 2 carriers. *Id*. The standards contained in Section 731.605 are benchmark standards. *Id*. That is, carriers are expected to meet the standards contained in subsections 731.605 (a) – (f). *Id*. These standards can be considered as "hard benchmarks," in that all services provided by Level 2 carriers are expected to at least meet, if not exceed, these standards. *Id*. Performance that does not meet these benchmark standards is considered to be failing, or sub-standard performance. *Id*.

Staff, based upon data provided by Level 2 carriers, expects that Level 2 carriers will face drastically smaller volumes of wholesale orders than Level 1 carriers. Tr. 371. Staff, consequently, in establishing the Level 2 standards, the associated remedies, and the relationship between the providing carrier and the requesting carrier, tried to keep it simple: that is, one miss, one remedy, and one carrier. Tr. 371. The standards

expressed in this Code Part for Level 2 carriers, moreover, are similar to the quality of service standards contained in Code Part 732, which set forth quality of service standards for retail service provision by all ILECs. Staff Ex. 4.0, at 5-6.

Section 251(c) of TA 96 establishes parity as the basic standard for quality of service provided by ILECs to interconnecting carriers.[5] As a general matter, parity is achieved if the wholesale services provided by an ILEC to an unaffiliated competitor are of equal or equivalent quality when compared to the service the ILEC provides to its affiliates or to its own retail customers. Staff Ex. 4.0, at 6-7. It is extremely difficult, however, to do parity calculations for small volumes of orders. Tr. 374. There needs to be large volumes on at least one side for parity calculations. *Id*. Because Level 2 carriers do not expect large volumes on either side, Staff did not recommend parity as a standard for Level 2 carriers. *Id*.

As an alternative, there is precedent for expressing performance standards as benchmark standards, instead of parity. Staff Ex. 4.0, at 7. Benchmark standards are generally considered to be a reasonable alternative to parity wholesale performance comparisons if a specific activity, such as provisioning a collocation space for a competitor, is unlike any of an ILEC's retail activities.[6] *Id*.

The "Pre-existing Plans" for both Ameritech Illinois and Verizon contain benchmark standards as well as parity comparison standards. Staff Ex. 4.0, at 8.

[5] Section 251(c)(2)(C) of TA 96, provides that each ILEC has the duty to provide interconnection: "that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection." 47 U.S.C.§ 251(c)(2)(C).

[6] For example, the Commission's rules and relevant PUA sections establish standards for retail service using benchmark standards. Examples of benchmark standards include the PUA requirement that telecommunications carriers must restore basic local exchange service for customers within 24 hours of receiving notice that a customer is out of service (§ 13-712 (d) (2)), and Code Part 730 standards for (continued…)

Performance standards expressed as benchmarks allows for dichotomous determination of passage and failure. *Id*. The performance standard would either be met, or not. As noted above, hard benchmarks provide more consistency with other Commission rules regulating service quality. *Id*. For example, the retail standards referenced above from Code Parts 730 and 732 are hard benchmark standards. *Id*.

1. Statistical Testing Is Not Appropriate For Level 2 Carriers

Citizens, and to a lesser degree, AT&T, both criticize Staff's proposed benchmark standards. They contend that the standard should be changed to a "percentage within" benchmark as an alternative to Staff's proposed benchmark found in § 731.605. *See* Citizens-Illinois Ex. 2.0, at 25; AT&T Ex. 1.0, at 7.

The principal advantage of benchmark standards, however, is that they minimize the reliance on statistical testing for determining whether acceptable performance has been provided or achieved. Staff Ex. 4.0, at 8. Statistical testing methods, such as parity testing or expressing standards as "a percentage within" a standard, could be administratively burdensome on Level 2 carriers.[7] As noted above, Staff's proposed Part 731 emphasizes very simple remedy calculations because all indications are that Level 2 carriers are expecting to be providing low volumes of interconnection services. Staff Ex. 10.0, at 17; Tr. 371.

(continued from previous page)
Transmission Requirements. *See* Code Part 730.525.

[7] Statistical methods can provide a way of accounting for "random" error in any assessment. Truly random error, however, is generally associated with large samples. Further, any kind of explainable deficiency is not random error, and shouldn't be confused with random error. Staff Ex. 4.0, at 9.

The performance standards expected of Level 1 carriers contain assessments of "average" monthly performance and the use of parity and "percent within" benchmark standards that, as described above, are more appropriate for the higher volumes of service that the Level 1 carriers are expected to encounter. Staff Ex. 10.0, at 17. The Illinois Level 1 carriers have also made substantial investments in operational support systems designed to automate many of the carrier-to-carrier operations that are addressed for Level 2 carriers. *Id.* While many of the Level 1 performance benchmark standards can be measured in seconds, minutes, or hours, the proposed Level 2 performance standards contained in Section 731.605 are measured in hours or days. *Id*.

Staff witness Dr. Patrick testified that statistical testing is useful for specific kinds of exercises. In particular, it is good for designing tests and drawing conclusions about a population based on some kind of sample or sampling technique. Staff Ex. 4.0, at 9. Given the likelihood that medium-sized carriers will be providing low volumes of interconnection services, assessment of their monthly performance can easily be based on a direct assessment of the totality of service provided. *Id.* That is, assessments can be made about the entire population of service provided. Therefore, inferences do not have to be drawn about a sample of observations. *Id.* Further, if statistical methods were used on low volumes of services provided by Level 2 carriers, only small-sample techniques could be recommended for use. The "power" of small-sample techniques is problematic, leading to less reliability for drawing conclusions about services quality. *Id.*

AT&T witness Ms. Moore, furthermore, references the existence of a "k-table" in the Ameritech remedy plan as evidence that Level 2 carriers might be held to a higher

standard. AT&T Ex. 1.0, at 8. Staff, however, points out that the Commission's recent order in Docket 01-0120 removes this concern, as it contains the Commission's order to Ameritech to remove the k-table provisions from its remedy plan. Staff Ex. 10.0, at 18-19.

In sum, introducing a "percentage within" definition to performance standards for Level 2 carriers will not improve the carrier-to-carrier service quality rules, and will introduce an unnecessary level of complexity for all parties. Staff Ex. 10.0, at 19. Level 2 carriers would have additional difficulty measuring the performance given, calculating remedies, and reporting their results. *Id*. Requesting carriers will have less assurance that their service requests will be answered within an established time frame, and that they will receive a remedy credit that is easy to calculate. *Id*. Staff, moreover, would face additional complexity in their oversight and monitoring functions. *Id.*

D. Section 731.610 -- Remedy Provisions for Level 2 Carriers

Section 731.610 contains the provisions for remedies for Level 2 carriers. In the event that a Level 2 ILEC provides service to a connecting carrier that fails to meet the standards established in Section 731.605, a remedy will be assessed. Remedies will be applied as credits on the purchasing carrier's bill. Staff Ex. 4.0, at 10.

Connecting carriers, obviously, are vitally interested in procuring service that is of good quality. *Id.* Standards establish the expectations of the Commission, but without remedies, standards are empty. In the absence of remedies, the reporting obligations would be a meaningless regulatory burden for the providing carriers. *Id.* Monthly assessment of performance, accompanied by remedies if established standards are not met, provides the best method of ensuring that all competitors receive service that will allow them to compete in a meaningful way. *Id*.

With two exceptions, the amounts for the remedies established in Section 731.610 are expressed as a proportion of the monthly recurring charge for each type of service. Staff Ex. 4.0, at 11. The two exceptions are for Loss Notification Failures and Customer Service Record Failures, Section 731.610 (d) and (e), respectively, which are established as fixed dollar amounts per failure. *Id.* Monthly recurring charges for the types of services covered by Subpart F (Level 2 Carriers), with only two exceptions, appear in tariff, so the amounts will be publicly known, in advance, for all services. These exceptions are the same as the ones just noted, for Loss Notifications and Customer Service Records. *Id.*

The standard for Firm Order Confirmations ("FOC") is established in Section 731.605(a). Level 2 carriers are expected to provide a response to a carrier's request for service, in the form of either a FOC or Reject Notice, within specific time periods. Staff Ex. 4.0, at 11-12. These time periods are established for each service type in section 731.605 (a). If a carrier fails to meet the established time periods for returning either a FOC or a reject notice for a particular service, section 731.610 (a) specifies that the carrier will provide a bill credit to the purchasing carrier equal to 20% of the monthly recurring charge for that particular service. *Id*., at 12. Similarly, section 731.610 (b) specifies that if a Level 2 carrier fails to provision a specific wholesale service within the standard time period established in section 731.605 (b), that carrier will provide a bill credit to the purchasing carrier equal to 20% of the monthly recurring charge for that particular service, per day. *Id.*

The standards for Maintenance and Repair failures are established in Section 731.605(c). If a carrier fails to meet the established time periods for clearing trouble

reports, section 731.610 (c) specifies that the carrier will provide a bill credit to the purchasing carrier equal to 20% of the monthly recurring charge for Unbundled Local Loops and Resold Local Services, per day. Staff Ex. 4.0, at 12. For Interconnection Trunks and Collocation services, bill credits will accrue at the rate of 10% of the monthly recurring charge for each type of service per 8 hour period. *Id.*

The remedy provisions for FOCs, Provisioning, and Maintenance and Repair failures are all expressed as a percentage of monthly recurring charges. Staff Ex. 4.0, at 13. This approach provides a common remedy measure, or proportion, across these types of services, and also makes the remedies sensitive to the different price levels of each type of service. *Id.* For FOCs, failures will result in a single remedy credit calculation for a missed standard. *Id.* For Provisioning Failures and for Maintenance and Repair Failures, a missed standard will result in a remedy credit amount that is a function of the duration of the "miss." *Id.* Maintenance and Repair failures are considered to be more serious, and can affect the end-user services provided by requesting carriers. *Id.* Staff recommends that the penalties for this type of missed standard should increase the longer it takes to clear the trouble. *Id.*

The 24-hour standards for Loss Notifications and Customer Service Records are established in Section 731.605(d) and (e), respectively. If a Level 2 carrier fails to meet those standards, the proposed remedy level is a $1 credit on the requesting carrier's bill (see Sections 731.610 (d) and (e)). Staff Ex. 4.0, at 13. Staff proposes that the remedy level for Level 2 carriers be set at $1 per violation for the purposes of this Code Part only. *Id.* at 14. This recommendation for line loss notifications failures and customer service record failures reflect a balance of the following competing considerations. *Id.*

First, Level 2 carriers receive no compensation for providing this information. Thus, it is not possible to use any market cost, or demand price, for this information as a basis for a remedy. Staff Ex. 4.0, at 14. Although the cost to provide the information is undoubtedly greater than zero (or non-zero), the cost for providing this service could be negligible, especially for customer service records maintained electronically. Customer Service Records and Loss Notification requests are dissimilar from the other measured services covered in subpart F, in that the other services have a one-to-one relationship with a service provided to a requesting carrier, for which the Level 2 carrier submits a bill. *Id.* The information is critical for the requesting carriers to obtain in order to attract and keep customers, and prevent harm from being done to their reputation in the marketplace. *Id.*

Second, CLECs need this information, and presumably advocate an extremely high penalty to represent the value they place on this information. *Id.* Level 2 carriers, on the other hand, argue for negligible penalties, given the economic price and accounting cost arguments outlined above. *Id.* To balance these competing concerns, Staff proposes a remedy of $1 per missed standard. *Id.*, at 15.

1. The Level 2 Remedy Plan Should Not Result In Significant Credits

Citizens, generally, had two related objections to Staff's proposed Level 2 remedy plan. First, Citizens contend that the remedy provisions of Code Part 731 could result in significant credits issued to requesting carriers. Citizens-Illinois Ex. 2.0 at 36. Second, that the remedy provisions in Section 731.610 should include a provision for a cap on remedies owed. *Id*., at 37.

Regarding Citizens contention that the Level 2 remedy plan could result in significant credits issued to requesting carriers, Citizens' witness Mr. Mason testified

that there have been no significant service quality problems for Level 2 carriers in Illinois. *Id*. Absent significant service quality problems, Citizens should have no difficulty in living up to the standards in the proposed Code Part 731 without issuing significant credits to requesting carriers. Staff Ex. 10.0, at 5-6.

Citizens also endorses a cap for maximum payable remedies, arguing that remedies should provide an incentive for a carrier to comply with the established standards, but that these remedies should not be "onerous." Citizens suggests that the proposed remedies could result in a "windfall" for requesting carriers. Citizens-Illinois Ex. 2.0, at 37. Although Citizens witness Mr. Mason suggests otherwise, a cap on remedies owed actually provides a disincentive for providing carriers to meet established standards.

In general, if remedies, such as the ones in the proposed Section 731.610, are capped at a certain level, a providing carrier can easily calculate the amount of delay (or "miss") that will result in the maximum possible remedy. Staff Ex. 10.0, at 6. Once that amount is known, the carrier can engage in a simple calculation exercise, and determine if the cost of meeting the standard, or of meeting the standard plus some amount of "affordable" miss, is worth avoiding the maximum penalty amount. *Id.* For example, if the maximum penalty amount would accrue within a known period of days, which could be represented by a variable X, the providing carrier has little incentive to provide the service by day X-1. *Id.* at 7. If the carrier calculates that the remedy owed would be nearly the maximum on day X-1, and would reach the maximum on day X and stay at that level on day X+1, etc., into infinity, that carrier faces only an incremental incentive to provide the service in any time frame that would attract the maximum

penalty amount. *Id.* Therefore, in theory, caps on maximum remedy amounts provide a disincentive to providing carriers to meet established standards. *Id.*

Although Citizens has suggested an apparently generous remedy cap, any remedy cap provides a disincentive to reaching service quality standards. Staff Ex. 10.0, at 7. Mr. Mason suggests a remedy cap of "10 times the monthly recurring charge for the service subject to the delay." *Id.* Given the already conservative nature of the remedies proposed in Section 731.610, and the generous standards contained in Section 731.605, a remedy cap equal to 10 times the associated monthly recurring charge would only be reached, in many cases, if the standard would be missed by a factor of 50. *Id.*

While Staff's theoretical objection to remedy caps remains, the remedy cap proposed by Mr. Mason introduces an entirely opposite problem. Staff Ex. 10.0, at 8. The cap suggested by Mr. Mason, in the context of the proposed standards and remedies, is so large as to be meaningless. *Id.* Further, imposing a cap that is only reachable if a providing carrier takes up to 50 times the recommended standard could be seen as an indication that the Commission barely expects the providing carriers to even try to meet the standards in the proposed Section 731.605. *Id.* Staff, accordingly, believes that Level 2 carriers should have no difficulty in living up to the standards in the proposed Code Part 731 without issuing significant credits to requesting carriers, which would obviate any wrongly perceived need for a cap. *Id.*

E. Section 731.620 -- Reporting Requirements for Level 2 Carriers

Section 731.620 contains the reporting requirements for Level 2 carriers. According to Section 731.620 (a), Level 2 carriers will have to provide quarterly reports

of their monthly service provision to all carriers to the Commission. Staff Ex. 4.0, at 16. According to Section 731.620 (b), Level 2 carriers also have to provide quarterly performance reports to their interconnecting carriers. *Id.* Finally, according to Section 731.620 (c), Level 2 carriers have to provide documentation to the Commission every two years regarding their performance standards definitions, or Business Rules. *Id.*

On a quarterly basis, Level 2 carriers will have to file reports with the Commission on their monthly performance. *Id.* At a minimum, according to Section 731.620 (a), carriers have to report the following items: (1) wholesale service quality credits (total dollar amount); (2) any credit amounts that are being protested by purchasing carriers; (3) level of wholesale performance provided to carriers, by performance standard, measured on an aggregate basis; and (4) a list of the top 3 carriers receiving wholesale service quality credits. *Id*., at 16-17.

On a quarterly basis, Level 2 carriers will have to report wholesale service performance information to each carrier that has purchased services during the previous three months. Staff Ex. 4.0, at 17. According to Section 731.620 (b), at a minimum, the monthly reports to each carrier must contain the following information items: (1) the number of reportable transactions; (2) the number of instances (or "observations") for which the Level 2 performance standards were not met; and (3) calculations to support the remedy credits given as a result of missed performance standards. *Id.* The performance standards for Level 2 carriers are contained in Section 731.605, and the remedy provisions are contained in Section 731.610. *Id.*

For Level 2 carriers, performance is assessed monthly, for services provided to each requesting carrier. Staff Ex. 4.0, at 18. The performance month should

correspond to the calendar month, as opposed to a billing month, a four-week month, etc. There are two reasons behind Staff's recommendation for monthly assessment of performance for Level 2 carriers. *Id.* First, many service arrangements are done according to a monthly calendar. That is, services are usually recorded and billed on a monthly basis. A carrier would be interested in an assurance that their service quality will be good this month, and having their service quality assessed monthly will support the ability of competing carriers to remain in the market. *Id.* Second, Staff is responsible for providing information to decision-makers, notably to the Commission and to the State Legislature. Putting the burden on carriers to consistently assess performance and provide reports to Staff will make it possible for Staff to provide timely reports to the Commissioners and the Legislature regarding the status of competition in Illinois. *Id*.

Another policy consideration is that these reports will facilitate Staff's understanding regarding how well the code part is functioning. *Id.* Staff review of the reports provided by the Level 2 carriers to the Commission will indicate what areas of Subpart F require review and revision in the future. *Id.* For example, additional penalties could be designed for a situation in which a Level 2 carrier "chronically" misses a standard, either for a single CLEC or for a group of CLECs. Staff Ex. 4.0, at 19. Currently, Staff has little basis for designing a remedy for chronic sub-standard performance, although such behavior might be a theoretical possibility, or even a likely outcome. *Id.* Information gathered through reports provided by carriers will allow Staff to determine whether a remedy for chronic "misses" is needed, and will assist Staff in designing an appropriate remedy when this Code Part is reviewed. *Id.*

F. Subpart G -- Provisions for Level 3 Carriers

Subpart G contains the provisions for Level 3 carriers. Level 3 carriers, as defined in Section 731.115 (c), are Illinois Local Exchange Carriers, which retain a Rural Exemption from the obligations of Section 251 (c) of TA 96. Staff Ex. 4.0, at 19. For the reasons outlined below, carriers that retain a Rural Exemption are exempted from the service responsibilities outlined in Code Part 731 (see Section 731.700). Section 731.705 contains provisions for conversion of a Level 3 carrier to a Level 2 carrier. *Id.,* at 19-20.

As noted in Section 731.700, the Rural Exemption for certain carriers is provided in Section 251(f) of TA 96. The Rural Exemption effectively excludes rural telecommunications carriers from the duties enumerated in Section 251(c) of TA 96 regarding interconnection and unbundling requirements. Staff Ex. 4.0, at 20. According to Section 251(f)(1), carriers retain their Rural Exemption until a Company receives a bona fide request for "interconnection, services, or network elements" (§ 251(f)(1)(A)). *Id.* Once a carrier with a Rural exemption receives such a bona fide request, and the State Commission receives a notice of that request from the requesting carrier, the "State Commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption …" 47 U.S.C. § 251(f)(1)(B). Staff notes that TA 96 provides that, if the Rural Exemption is terminated, it is still possible for a carrier to petition for a suspension or modification of the Commission's findings. *See* 47 U.S.C. § 251(f)(2); *see also* 47 C.F.R. § 51.

Section 731.705 enumerates the procedures for conversion of a Level 3 carrier to a Level 2 carrier. As noted in Section 731.705(a), if a telecommunications carrier has

its Rural Exemption terminated through a Commission order, that carrier will be considered a Level 2 carrier. Staff Ex. 4.0, at 21. Within 90 days after the date of the Commission's order, that carrier will have to comply with the requirements contained in Subpart F for Level 2 carriers. *Id*. Section 731.705(b) describes the process that Level 3 carriers that have lost their Rural Exemption can use to petition the Commission for an exemption from some or all of the Level 2 requirements. *Id.* This subsection requires that the burden of proof be on the petitioner, and provides a list of considerations that the Commission can use in considering its findings. *Id*.

Staff believes that the provisions of Section 731.705 are reasonable because they are based on the provisions for establishing 251(c) obligations, under TA 96, for carriers that have had their Rural Exemption terminated pursuant to the findings of a State commission. See 47 U.S.C. § 251(f)(2). Within 90 days after a Commission order, the carrier whose Rural Exemption was terminated will have to comply with the interconnection and unbundling requirements listed in Section 251(c) of TA 96 within 90 days. *Id*. TA 96 also allows for carriers to petition for a full or partial exemption from these interconnection duties using procedures that are nearly identical to the procedure enumerated in Section 731.705. Staff Ex. 4.0, at 21. Since an Illinois carrier with a Rural Exemption must comply with the interconnection duties of the Federal Act within 90 days, it is reasonable for such a carrier to comply with the provisions of Code Part 731 for Level 2 carriers within the same time frame. *Id.,* at 21-22.

While the federal act places certain size restrictions on whether a carrier can petition for a modification of the requirements of Section 251(c), Code Part 731 provides a more generous standard, allowing any carrier to petition for an exemption of part or all

of the service quality requirements set out in Subpart F for Level 2 carriers. According to recent FCC data, any Illinois carrier with a rural exemption would be eligible to petition for modifications of the Section 251(c) requirements under TA 96. *See* Common Carrier Bureau, *Trends in Telephone Service* (August 2001), Table 8.3; Staff Ex. 4.0, at 22.

VII. CONSUMER ISSUES

Staff witness, Ms. Jackson, testified that in the eyes of a consumer, the process of switching from one carrier to another carrier should be a very simple process – call a carrier and ask for their service. Staff Ex. 11.0, at 13. After that call is placed, however, a very complex behind the scene process begins, which includes numerous interactions by the carriers and various timeline(s) for the different steps in the customer switching process. Consumers are not aware of the all of the processes and standards, and the trading of information between carriers that exists for wholesale service quality and switching from one carrier to another. *Id.,* at 14. This results in consumers erroneously placing the blame on the wrong carrier or the appearance that a carrier is at fault when there is an underlying problem that is unknown to consumers. *Id.* Consequently, if a consumer experiences a delay or difficulty in switching from one carrier to another, they may never try to switch to another carrier again, thereby losing the ability to possibly save money or subscribe to a calling plan that better suits their needs, or receive more advanced services, thus harming competition. *Id.* Staff believes that this rulemaking will help enable consumers to switch carriers promptly without unreasonable delay, thus helping competition and consumers. *Id.*

More specifically, Ms. Jackson testified that consumers experience many problems when moving out of a dwelling when the line is live and the new individual

moves in, which presents two problems for consumers: (1) the new tenant can use the previous tenants service and run up the telephone bills; or (2) the new tenant wants service with a specific carrier, but does not know who the current carrier is or has difficulty finding out who is the current carrier providing service to the dwelling. Staff Ex. 11.0, at 10. These problems require the consumer to make numerous calls to different carriers to track down the right carrier, previous tenant or landlord, to find out which carrier is providing the service. *Id.*

In light of the above-noted problems articulated by Ms. Jackson, Staff proposes to add definitions, standards, and remedies for Customer Service Record ("CSR"), Unbundled Loop Return, and Line Loss Notification for Level 2 and Level 4 carriers. Staff also notes that the preexisting plans of the Level 1 carriers already include standards, benchmarks, and remedies for CSR, Unbundled Loop Return, and Line Loss Notification that are consistent with those proposed by Staff for Level 1 and 4 carriers.

A. Customer Service Record

Staff's proposed § 731.105 contains Staff's definition of CSR. Staff proposes that the CSR definition be incorporated into this rule, in response to complaints received by the telecommunications carriers and the Consumer Services Division from consumers who are not experiencing a smooth transition upon the transfer from one local exchange carrier to another: from Local Exchange Carrier ("LEC") to Competitive Local Exchange Carrier ("CLEC"), CLEC to LEC, and CLEC to CLEC. Staff Ex. 5.0, at 4. The addition of this definition, along with the existing standards and remedies for Level 1 carriers, and the remedies proposed by Staff in §§ 731.610(e) and 731.810, will help to ensure that the CSR is being transferred between carriers in an efficient, timely,

and seamless manner to the customer, thereby providing quality wholesale service to Illinois consumers. *Id.*

Staff understands that many things happen when a consumer places a request to switch from one carrier to another, but that one of the first requests is to request the customer service record. Staff Ex. 11.0, at 6. If a carrier has a sophisticated computerized system, carriers can go into the system and pull the customer service record and begin conversing with the consumers. *Id.,* at 6-7. If it is a manual system, however, the carrier has to send a request for the customer service record and then wait for the record to be sent to them before conversing with the consumer. *Id.* at 7. In some instances, consumers have been told that it could take 30, 45, or 60 days (or even longer) to switch from one carrier to another. *Id.* These delays are difficult to explain to consumers and for consumers to understand, especially when it takes less time to make a major purchase, such as buying a car or a house. Switching a consumer from one carrier to another should be transparent to allow for a full functioning marketplace. *Id.*

The telecommunications carrier needs the most up to date information about its new customer, so that the customer is not inconvenienced by having to recite all of the specifics relating to receiving telecommunications service that is already on record. *Id.* Even if a carrier may have formerly served this customer, the CSR needs to be provided, so that new or revised customer information is available to the new carrier. *Id.* The availability of the CSR, prior to serving the customer, allows the new telecommunications carrier to review the services and features that the customer has previously used and allows the customer to reassess the services and features for

continued use. *Id.* It also allows a customer to change or delete any services and/or features, because of increased costs of the product(s) or the customer no longer wants the product or service. *Id.*

B. Unbundled Loop Return

Staff's proposed § 731.105 contains Staff's definition for Unbundled Loop Return. Staff proposes that the Unbundled Loop Return definition be incorporated into this rule, in response to complaints received by the telecommunications carriers and the Consumer Services Division from consumers who are not experiencing a smooth transition upon the transfer from one local exchange carrier to another: from LEC to CLEC, CLEC to LEC, and CLEC to CLEC. Staff Ex. 5.0, at 5. The implementation of this definition will require carriers who have lost a customer to relinquish that customer's loop to the provisioning carrier. *Id.* This will eliminate customers from having to wait to receive local exchange service because of limited loop availability, when other carriers are not utilizing loops. *Id.*

Staff witness, Ms. Jackson, testified that the process of returning an unbundled loop should have a standard for the actual return of the loop to ensure that the loop is returned to complete the process. Staff Ex. 11.0, at 9. Staff believes that the unbundled loop should be returned 24 hours after the loss of the customer utilizing that particular loop. *Id.* Ms. Jackson testified, however, that she does not believe that a FOC needs to be implemented for the unbundled loop return. In this instance, she believes that the FOC could impose a burden on the returning carrier, by creating an unnecessary step in the process. Staff Ex. 11.0, at 8.

Staff, furthermore, knows of no reason why a carrier would need to retain the loop. Staff Ex. 11.0, at 12. It is Staff's understanding that even if a carrier immediately

obtains a new customer to replace the loss of another customer, that the recently vacated loop could not be utilized, as the underlying carrier would still have to assign the loop. *Id.* Implementation of a standard for the unbundled loop return will help to ensure that a customers' service is terminated and terminated by a specific date, which should also cease the billing. *Id.*

Finally, the non-release of the unbundled loop has had a specific impact on consumers switching from one CLEC to another CLEC. If a consumer wants to switch from one CLEC to another CLEC, it has been recommended by the CLEC that the consumer first establish or re-establish service with the ILEC and then switch to the new CLEC. Staff Ex. 11.0, at 12. This results in the consumer having to incur additional costs and time establishing service with the ILEC before requesting to be switched to the new CLEC. Staff does not believe that such scenarios conform with the intent of the wholesale service quality rules, nor is it compliant with the prompt execution of the switching process as stated in Section 13-902(c)(3) of the PUA. *Id.*

C. Loss Notification

Staff's proposed § 731.105 contains Staff's definition for Loss Notification. In response to complaints received by the telecommunications carriers and Consumer Services Division from consumers who complain that their former carrier was continuing to bill (or double bill) them after switching to a new carrier, Staff proposes that the Loss Notification definition be incorporated into this rule. Staff Ex. 4.0, at 4. The addition of this definition, along with the existing standards and remedies for Level 1 carriers, and the remedy proposed by Staff in §§ 731.610(d) and 731.810, will help to ensure that the loss notification is being sent to the carrier losing the customer. *Id.* at 4-5. The loss notification should, thus, result in a seamless transfer of a customer, and the elimination

of carriers continuing to bill (or double billing) customers, thereby providing quality wholesale service to Illinois consumers. *Id.* at 5.

Ms. Jackson testified that consumers are experiencing problems when trying to switch from one carrier to another carrier and cannot get their lines released from their current carrier so that they can move their service to a new carrier. Staff Ex. 11.0, at 10. This results in numerous calls to the carrier and to the Commission. It appears that the consumer's current carrier is holding the consumer hostage. *Id.* Consequently, the worst-case scenario for a consumer who requires service switched immediately is to have to incur the cost to have new inside wire and receive a new telephone number. *Id.* at 10-11. Consumers should not be required to incur this expense or inconvenience in order to switch telecommunications carriers. Staff does not believe that this is the intent for wholesale service quality or competition, nor is it compliant with Section 13-902(c)(3) of the PUA, which requires prompt execution of the switching process without any unreasonable delay of changes. *Id.* at 11.

VIII. SPECIAL ACCESS

Staff's proposed Part 731 provides that "[t]he services to be covered for a Level 1 carrier shall include wholesale special access services, and shall include wholesale special access measures for ordering, provisioning, and repair." Section 730.305, Rebuttal testimony (McClerren) Attachment 7.11. In addition, Staff has proposed the following definition of Wholesale Special Access:

> A Wholesale Service utilizing a dedicated non-switched transmission path used for carrier-to-carrier services from the customer's NID (Network Interface Device) or POI (Point of Interface) to the carrier's POI (Point of Interface). A non-switched transmission path may include, but is not limited to, DS1, DS3, and OCN facilities as well as links for SS7 signaling, database queries, and SONET ring access.

Section 731.105.

Furthermore, Section 731.105 defines "Wholesale service" as follows:

> "Wholesale Service" means any telecommunications service subject to the Commission's jurisdiction that one carrier sells or provides to another carrier, as a component of, or for the provision of, telecommunications service to end users.

As the evidence in this case has confirmed, wholesale special access has become a significant means by which carriers provide telecommunication services in Illinois. Worldcom Witness Karen Furbish testified:

> Yes, clearly incumbent LECs like SBC-Ameritech and Verizon are still dominant in the provision of all last-mile facilities, whether a competing carrier must order the large ILECs' facilities as UNEs, or EELs, or intrastate Special Access, or--most often--as interstate Special Access. Competitive LECs, IXCs, and wireless carriers are dependent on the ubiquitous 'last mile' facilities of incumbent LECs like SBC-Ameritech and Verizon to compete for larger-volume business and government customers, or to connect cell sites."
>
> Worldcom Exhibit 1.0 at 8.

Wireless Coalition witness Lester Tsuyuki testified as to the importance of intrastate special access services for wireless carriers. "Contrary to the direct testimony of Ameritech witness Panfil and Verizon witness Raynor, the members of the Wireless Coalition use wholesale special access services to interconnect elements of their networks in the provision of their wireless telecommunications services." Wireless Coalition Ex. 8.0 at 4. "…[special access] allows us infrastructure to actually extend our radio signal." Tr. at 814. Staff's rule recognizes this dependence of competitive carriers upon ILECs' special access services to provide telecommunication services in Illinois to ensure that these services are provisioned in a just, reasonable, and nondiscriminatory manner.

Staff however has limited the application of Wholesale Special Access performance measures and remedies to the provisioning by Level 1 carriers of intrastate Wholesale Special Access services. While Level 2 carriers appear also to provide intrastate special access services, Ameritech and Verizon are the dominant carriers providing these services. "Ameritech and Verizon, the two largest ILECs in Illinois, have resources and facilities far in excess of every other carrier in Illinois, serve the most populous areas of our state and provide the lion's share of wholesale carrier to carrier services." Wireless Coalition Exhibit 8.0 at 6. "In non-urban areas, there is essentially no competition with respect to wholesale special access services. Ameritech and/or Verizon typically are the only carriers from which wholesale special access services can be obtained." Wireless Coalition Exhibit 8.0 at 5.

By defining Wholesale Services as those services "subject to the Commission's jurisdiction," Staff has limited the applicability of the rule to those services that are intrastate.[8] Verizon apparently objects to including wholesale special access in Part 731 on the grounds that it is primarily an interstate service and as such raises jurisdictional concerns. Verizon's witness, Ms. Raynor, argues that: "Special access is primarily an interstate service that should not be addressed in this rulemaking. Verizon Exhibit 1.0 at 11. Staff does not agree. Part 731 defines "Wholesale Special Access" as a wholesale service. The definition of "wholesale services" is in turn defined in Part 731

[8] Staff notes that the FCC, in its Notice of Proposed Rulemaking regarding Special Access, is considering permitting states to play a role in implementing and enforcing standards regarding *interstate* special access services :"We seek comment on the extent to which state commissions could play a role regarding interstate special access services." *In the Matter of Performance Measurements and Standards for Interstate Special Access Services*, CC Docket 01-339, released November 19, 2001, at ¶ 11 (hereinafter, "Special Access NPRM"). In the event the FCC expands the state's role beyond its intrastate jurisdiction, the ICC's jurisdiction under this rule would be similarly expanded.

as those services subject to the ICC's jurisdiction. As a result, Part 731 limits the scope of such services to those within the Commission's jurisdiction and does not attempt to regulate interstate special access services. Verizon's concern that Part 731 inappropriately addresses interstate special access services is without merit.

Verizon also argues that special access is currently subject to the FCC's Notice of Proposed Rulemaking addressing special access services and that, as a result, the Commission should defer the imposition of any wholesale special access standards because such imposition may cause a conflict with the federal proceeding." Id. Verizon's arguments are not persuasive. The Commission's jurisdiction over intrastate special access is not questioned by the FCC. "To be sure, state commissions have jurisdiction over intrastate special access services." Special Access NPRM at ¶ 11. It is highly unlikely that a conflict could arise with Staff's proposed rule unless the final Part 731 adopted in this proceeding regulated interstate special access services. As stated above, the rule defines wholesale services as those subject to the ICC's jurisdiction. The Telecommunications Act of 1996 expressly preserves the state authority to regulate access intrastate services for purposes of furthering competition.

> Additional State Requirements. Nothing in this part precludes a state from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the Stat's requirements are not inconsistent with this part or the Commission's regulations to implement this part.
>
> 47 U.S.C. § 261(c).

Ameritech recognizes that Staff's proposed definition of Wholesale Special Access is limited to services subject to the Commission's jurisdiction. AI Exhibit 1.0 at 21. Nevertheless, Ameritech argues that addressing intrastate special access does not

make good policy sense since the majority of special access circuits are jurisdictionally interstate and, thus fall outside of the jurisdiction of this Commission and within the interstate jurisdiction of the FCC. Id. Staff disagrees. As Staff testified, "…there are enough intrastate circuits being ordered by both wire and wireless carriers that there needs to be standards, measurements and remedies for those companies ordering these wholesale services." Staff Exhibit 8.0 at 4-5. Ameritech also raises the concern that Part 731's rules regarding intrastate special access services may conflict with the FCC's rulemaking regarding interstate special access services. Again, Staff points out that the FCC's rule and Part 731 will not conflict with one another since each will address their own separate jurisdictional aspects of wholesale special access. The only realistic potential problem that may arise is that Staff's rule has not gone as far as the FCC determines States may appropriately act with respect to regulating *interstate* special access. Staff, however, believes it is prudent to wait until the Special Access NPRM has been finalized before wading into the waters of interstate special access.

Ameritech also argues that the rule is too vague to be meaningful or reasonable and that it may require a Level 1 carrier to propose standards, measurements, and remedies for a huge number of services. Ameritech Illinois Exhibit 1.0 at 22. Staff disagrees with Mr. Panfil's interpretation of Staff's proposed rule. Staff has pointed out that its proposed rule applies solely to Wholesale Special Access and not Special Access generally, and for wholesale carrier-to-carrier services, not retail services, both of which limit Staff's proposed rule to exclude most, if not all, of Mr. Panfil's concerns. In addition, Staff suggests that each ILEC will have the opportunity to propose whatever

standards and measures that the ILEC deems reasonable in the context of the proceeding addressing its individual remedy plan. Staff Exhibit 8.0 at 5.

Moreover, with respect to Wholesale special access, as the Wireless Coalition points out in its testimony, to the extent the Commission disagrees with Staff's defense of this criticism that the rule is too vague, the Wireless Coalition has provided very specific wholesale special access performance measures and standards in its direct testimony to apprise the carriers of the type of performance measures and standards the Wireless Coalition would expect to propose. Wireless Coalition Exhibit 8.0 at 10. Likewise, Worldcom has provided specificity by supporting the Joint competitive Industry Group Special Access Performance Measures Worldcom Exhibit 1.0 (Attachment B); Worldcom Exhibit 1.1 at 11.

Ameritech also asserts that imposition of special access performance measures under the Part 731 rule may create problems for existing special access services and customers. Essentially, Ameritech argues that it would be expensive, time-consuming, and disruptive to replace whatever existing arrangements Ameritech has in place with those standards and remedies imposed by Part 731. AI Exhibit 1.20 at 8. Unfortunately, taking Ameritech's argument to its logical extreme, this Commission could never impose standards on carriers if they differed from those that were voluntarily entered into by the carriers. Moreover, there are sufficient methods in place to allow carriers to amend both their tariffs and interconnection agreements to conform to new regulation. Nothing precludes a carrier from filing amendments to its tariffs or exercising its rights under Change of Law provisions in its interconnection agreements. At any rate, this argument is more appropriately made in this proceeding to address the

specific proposals of the Wireless Coalition and Worldcom, or, with respect to Staff's proposal, in the context of the proceeding that will actually address proposed changes to the Level 1 carriers' performance measures and remedy plans.

Worldcom essentially agrees with Staff's proposed Part 731 as it relates to wholesale special access; however, Worldcom suggests that Staff's definition of Wholesale Special Access is too restrictive. Worldcom Exhibit 1.0 at 17. WorldCom's proposed Wholesale Special Access definition is as follows:

> "Wholesale Special Access" means a Wholesale Service that provides a non-switched transmission path between two or more points, either directly, or through a central office, where bridging or multiplexing functions are performed, not utilizing ILEC end office switches. Special access services may include dedicated and shared facilities configured to support analog/voice grade service, metallic and/or telegraph service, audio, video, digital data service (DDS), digital transport and high capacity service (DS1, DS3 and OCN), collocation transport, links for SS7 signaling and database queries, SONET ring access, and broadband services.

Staff, however, believes its definition of wholesale special access is consistent with WorldCom's definition and not more restrictive. WorldCom's definition provides greater detail regarding the transmission path and included services; however, this greater level of detail is not inconsistent with Staff's simpler definition. It is Staff's view that the level of detail in Worldcom's definition may actually cause it to be interpreted in a manner that may be more restrictive than WorldCom apparently expects.

The WorldCom definition includes transmission "through a central office, where bridging and multiplexing functions are performed." As Staff explained in its rebuttal testimony, while including these functions may be accurate for today's methods, these functions may not be required in the future and therefore including them may be overly restrictive. Staff Exhibit 8.0 at 8. Further, Staff points out that this level of detail is not necessary to define wholesale special access. It is also not necessary to include

"analog/voice grade service, metallic and/or telegraph service, audio, video, digital data service (DDS), digital transport" in the definition, although Staff does agree that, assuming appropriate circumstances and terms and conditions of service, these identified services may indeed be wholesale special access services. Id.

Staff's preference, however, is that the definition not include the additional services identified by WorldCom for two reasons. First, Staff's definition is all-inclusive without the need to define these individual current services. Second, there is no industry consensus regarding the definition of some of the identified services. For example, Staff would eliminate the term "broadband services" referenced in Worldcom's definition of wholesale special access because there is no clear industry opinion as what constitutes "broadband services". Furthermore, Staff raises the possibility that what may be identified as a "broadband service" today may not be a "broadband service" tomorrow. Staff posits that it may be easier and more constructive to propose performance measures and remedies for these services in the context of an individual carrier's remedy plan where reference to tariffed services could reduce any ambiguity as to identification of the services subject to reporting.

The Wireless Coalition witnesses have commented on a broad range of problems that they contend they face in procuring Wholesale Special Access arrangements. Based upon these problems, the Wireless Coalition recommends an array of new definitions and new performance measures and standards and a revised version of Staff's proposed definition of Wholesale Special Access.

To date, Staff has not had the opportunity to investigate and to monitor these problems and does not have sufficient information at this time to confirm each of the

individual issues raised. That said, Staff recognizes that this proceeding has provided significant evidence that issues are not being resolved in a manner that supports competition. See, Tr. at 884-888 (inadequate process for resolution of AI's report discrepancies); Tr. at 900-901 (discrepancies in AI's raw data and summaries of special access reports); Wireless Coalition Exhibit 6.0 at 6-7 (unrebutted testimony regarding poor service quality regarding AI's and Verizon's provisioning of wholesale special access).

Staff, nonetheless, believes that its proposed definition of Wholesale Special Access is broad enough to address most Wholesale Special Access situations. The Wireless carriers disagree and have raised at least one circumstance under which Staff's rule may not include a special access arrangement used by wireless carriers in providing telecommunications service. See, Tr. at 873-874. Staff points out, however, that the Wireless Coalition is not precluded from raising its concerns in the context of an individual carrier's remedy plan. In addition, Staff believes that these issues are more appropriately raised in that context in light of the differing systems, remedy plans and business rules of each of the Level 1 carriers. Staff notes that it will also have an opportunity to revisit the Wireless Coalition's issues regarding Level 1 carriers, when the Level 1 carriers file their respective wholesale service quality plans with the Commission pursuant to Staff's proposed rule.

The issue with respect to Level 2 carriers is not as straightforward. While the Wireless Coalition apparently agrees with the structure of Staff's rule regarding the creation of levels of carriers (i.e., a structure which permits a more limited set of standards and measures to be imposed upon Level 2 carriers due to the differences in

resources, facilities and customer base), the Wireless Coalition nevertheless argues that Level 2 carriers should be required to satisfy some performance measures and standards pertaining to wholesale special access services. Wireless Coalition 8.0 at 6, 8. Regarding Level 2 carriers, Staff believes that, at this time, the level of Wholesale Special Access requests of Level 2 carriers does not appear to be sufficient to justify establishing standards applicable to Level 2 carriers. Indeed, the Wireless Coalition concedes that its members "purchase approximately 95-100% of their intrastate, intraLATA, wholesale special access services from Level 1 carriers. Wireless Coalition Exhibit 8.0 at 6. In addition, Staff acknowledges that it would benefit from the experience gained in reviewing the impact on Level 1 carriers of special access standards prior to imposing similar, albeit, more limited standards on Level 2 carriers. Staff Exhibit 8.0 at 11.

IX. CONCLUSION

WHEREFORE, for all the reasons set forth herein, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in this proceeding.

Respectfully submitted,

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